Supreme Court, U.S.
FILED

Nos. _____; _____; _____; _____ **981026** DEC 2 2 1998

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In The
Supreme Court
Of The
United States

October Term, 1998

STATE OF WASHINGTON, *Petitioner*,

v.

UNITED STATES OF AMERICA, ET AL., *Respondents*.

PUGET SOUND SHELLFISH GROWERS, *Petitioners*,

v.

UNITED STATES OF AMERICA, ET AL., *Respondents*.

LARRY B. AND SHIRLEE ALEXANDER, ET AL., AND WILLIAM AND CHARMOND ADKINS, ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA, ET AL., *Respondents*.

26 TIDELAND AND UPLAND PRIVATE PROPERTY OWNERS ("UPOW"), *Petitioners*,

v.

UNITED STATES OF AMERICA, ET AL., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITIONS FOR A WRIT OF CERTIORARI

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157 F.3d 630

UNITED STATES of America;
Muckleshoot Tribe; Nooksack; Upper Skagit; Squaxin Island;
Lummi Indian Tribe; Makah Tribe; Tulalip Tribe; Swinomish Indian
Tribal Community; Quileute Indian Tribe; Puyallup Tribe; Hoh
Indian Tribe; Suquamish Tribe; Quinault Indian Nation;
Confederated Tribes & Bands of the Yakima Indian Nation;
Nisqually Indian Tribe; Jamestown Tribe; Lower Elwha Klallam
Tribe; Port Gamble Bands; Skokomish Tribe; Sauk-Suiattle Tribe;
Stillaguamish Tribe,
Plaintiffs-Appellees,

v.

STATE OF WASHINGTON,
Defendant-Appellant.

UNITED STATES of America;
Muckleshoot Tribe; Nooksack; Upper Skagit; Squaxin Island;
Lummi Indian Tribe; Makah Tribe; Tulalip Tribe; Swinomish Indian
Tribal Community; Quileute Indian Tribe; Puyallup Tribe; Hoh
Indian Tribe; Suquamish Tribe; Quinault Indian Nation;
Confederated Tribes & Bands of the Yakima Indian Nation;
Nisqually Indian Tribe; Jamestown Tribe; Lower Elwha Klallam
Tribe; Port Gamble Bands; Skokomish Tribe; Sauk-Suiattle Tribe;
Stillaguamish Tribe,
Plaintiffs-Appellees,

v.

STATE OF WASHINGTON, et al.,
Defendants,

and

26 Upland and Tideland Private Property Owners, (Dan Buehler,
Robert L. Davis, Bruce I. Fielding, Arthur J. Gerdes, Joe Hoots,
Keith C. Huetson, Commander J.C. James, Richard Sayre Koch,
Elaine C. Lefler, Joan Lemonds-Roush, John S. Lewis,
Steven L. Luke, Edward R. McMillan, Robert F. Newman, Mark A.
Nysether, Arthur I. Price, Ray D. Randall, Cynthia Ramussen,
Robert G. Shanks, Axel Strakeljahn, Leana Tracy,
Stuart W. Turner, George B. Usnick, Lee S. Vincent, Joan Walker
and William E. Whitney, Jr.),
Defendants-Intervenors-Appellants.

UNITED STATES of America;
Muckleshoot Tribe; Nooksack; Upper Skagit; Squaxin Island; Lummi Indian Tribe; Makah Tribe; Tulalip Tribe; Swinomish Indian Tribal Community; Quileute Indian Tribe; Puyallup Tribe; Hoh Indian Tribe; Suquamish Tribe; Quinault Indian Nation; Confederated Tribes & Bands of the Yakima Indian Nation; Nisqually Indian Tribe; Jamestown Tribe; Lower Elwha Klallam Tribe; Port Gamble Bands; Skokomish Tribe; Sauk-Suiattle Tribe; Stillaguamish Tribe,
Plaintiffs-Appellees,

v.

STATE OF WASHINGTON, et al.,
Defendants,

and

James Hadley; James Carter; Ann Carter; Charmond Adkins; Larry Alexander; Shirlee Alexander; Grace Boyd; Pierce Davis; Rosemary Duncan; May Davis; James C. Johnston; Sarah Johnston; W.K. Kirch; Jo Ann Kirch; David Mitchell; Louis Nawrot, Jr.; Boon Ho Woo; Harold Bauer; Billie Bauer; William Chase; Frances Fellows; George Grader; Earl Hunsperger; Millicent Hunsperger; Edward Krenz; Eleanor Krenz; H.J. Merrick; Moss Gordon; Margaret Moss; Sewall Reynolds; Emma Reynolds; John Riach; Alva Hazel Robb; Irene Smith; Providence Worley,
Defendants-Intervenors- Appellants.

UNITED STATES of America, et al.,
Plaintiff,

and

Lummi Tribe; Muckleshoot Tribe; Nooksack; Upper Skagit; Squaxin Island; Makah Tribe; Swinomish Indian Tribal Community; Tulalip Tribe; Puyallup Tribe; Quileute Indian Tribe; Hoh Indian Tribe; Suquamish Tribe; Nisqually Indian Tribe; Jamestown Tribe; Lower Elwha Klallam Tribe;
Port Gamble Bands; Skokomish Tribe; Sauk-Suiattle Tribe; Stillaguamish Tribe,
Plaintiffs-Intervenors-Appellants,

and

Quinault Indian Nation;
Confederated Tribes & Bands of The Yakima Indian Nation,
Plaintiffs-Intervenors,

v.

STATE OF WASHINGTON, et al.,
Defendants-Appellees.

UNITED STATES of America, et al.,
Plaintiff-Appellant,

and

Muckleshoot Tribe; Nooksack; Upper Skagit; Squaxin Island;
Lummi Indian Tribe; Makah Tribe; Tulalip Tribe;
Swinomish Indian Tribal Community; Puyallup Tribe;
Quileute Indian Tribe; Hoh Indian Tribe; Suquamish Tribe;
Quinault Indian Nation; Confederated Tribes & Bands of the
Yakima Indian Nation; Nisqually Indian Tribe; Jamestown Tribe;
Lower Elwha Klallam Tribe; Port Gamble Bands; Skokomish Tribe;
Sauk-Suiattle Tribe; Stillaguamish Tribe,
Plaintiffs-Intervenors,

v.

STATE OF WASHINGTON, et al.,
Defendant-Appellee.

UNITED STATES of America,
Plaintiffs-Appellees,

and

Lummi Indian Tribe; Muckleshoot Tribe; Nooksack; Upper Skagit;
Squaxin Island; Makah Tribe; Swinomish Indian Tribal Community;
Tulalip Tribe; Puyallup Tribe; Quileute Indian Tribe; Hoh Indian
Tribe; Suquamish Tribe; Quinault Indian Nation; Confederated
Tribes & Bands of the Yakima Indian Nation; Nisqually Indian
Tribe; Jamestown Tribe;
Lower Elwha Klallam Tribe; Port Gamble Bands; Skokomish Tribe;
Sauk-Suiattle Tribe; Stillaguamish Tribe,
Plaintiffs-Intervenors-Appellees,

v.

STATE OF WASHINGTON, et al.,
Defendant,

and

Puget Sound Shellfish Growers,
Defendants-Intervenors-Appellants.

Nos. 96-35014, 96-35082, 96-35142, 96-35196,
96-35200, 96-35223.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 5, 1997.

Decided Jan. 28, 1998.
Amended Sept. 25, 1998.

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Evelyn S. Ying (Argued), Ann C. Juliano, Martin W. Matzen, Peter C. Monson, Attorneys, United States Department of Justice, Environment & Natural Resources Division, Washington, DC, for United States.

Jay D. Geck (Argued), Fronda Woods, and Robert C. Hargreaves, Assistant Attorneys General, John W. Hough, Senior Assistant Attorney General, Attorney General's Office, State of Washington, Olympia, WA, for defendants-appellants-cross-appellees.

James M. Johnson (Argued), Olympia, WA, for, 26 Tideland and Upland Private Property Owners ("UPOW").

Howard M. Goodfriend (Argued) and Malcolm L. Edwards, Edwards, Sieh, Hathaway, Smith & Goodfriend, Seattle, WA, for Private Owners.

Michael Himes (Argued), Albert Gidari, Jr., Perkins Coie, Seattle, WA, for Puget Sound Shellfish Growers.

Eric Richter, Skeel Henke, Evenson & Roberts, Seattle, WA, for Adkins, et. al.

Mason D. Morisset, Seattle, WA, for Tulalip Tribes. Riyaz A. Kanji, Williams and Connolly, Washington, DC, for Jamestown, Lower Elwha, Port Gamble Bands of S'Klallams, Nisqually, Nooksack, Sauk-Suiattle, Skokomish, Squaxin Island, Stillaguamish and Upper Skagit Tribes, Indian Tribes.

John Sledd, Mary Linda Pearson, for the Suquamish Tribe.

Daniel A. Raas, Harry L. Johnsen, for the Lummi Tribe.

Richard Berley, John Arum, Mark Slonim, for the Makah Tribe.

Bill Tobin, Christina Berg, for the Nisqually Tribe.

Annette M. Klapstein, John Howard Bell, Debra S. O'Gara, for the Puyallup Tribe.

Kevin R. Lyon, Ronald Whitener, for the Squaxin Island Tribe.

Robert L. Otsea, for the Muckleshoot Tribe.

Kathryn Nelson, Amy C. Lewis, co-counsel for the Port Gamble, Lower Elwha, Jamestown Bands of S'Klallams and the Skokomish Tribe.

Leslie Barnhart, Lori Salzarulo, Ruth Kennedy for the Quileute Tribe.

Nettie Alvarez, Richard Ralston, for the Hoh Tribe.

Jeffrey Jon Bode, co-counsel for the Nooksack Tribe.

Edward G. Maloney, co-counsel for the Upper Skagit Tribe.

Harold Chesnin, co-counsel for the Upper Skagit Tribe.Allan E. Olson, for the Swinomish Indian Community.

Daniel W. Wyckoff, Olympia, WA, Tom D. Tobin, Winner, SD, for amicus curiae Inner Sound Crab Association and Washington Dungeness Crab Fishermen's Association.

Stephanie L. Striffler, Assistant Attorney General, Salem, OR, for amicus curiae State of Oregon.

Nancie Marzulla, Washington, DC, for amicus curiae Defenders of Property Rights.

Robin Rivett, Sacramento CA, John M. Groen, Bellevue, Washington, for amicus curiae Pacific Legal Foundation.

Toby Thaler, Seattle, WA, for amicus curiae Washington Environmental Council.

Appeals from the United States District Court for the Western District of Washington Edward Rafeedie, District Judge, Presiding. D.C. No. CV-89-00003-ER.

Before: LAY,* BEEZER and TROTT, Circuit Judges.

Order Amending Opinion And Denying Petition For Rehearing And Rejecting Suggestion For Rehearing En Banc And Amended Opinion

OPINION

TROTT, Circuit Judge.

ORDER

The Opinion filed January 28, 1998, slip op. 783, and appearing at 135 F.3d 618 (9th Cir.1998), is amended as follows:

1. At slip op. 829, last sentence of the first full paragraph; 135 F.3d at 640, first full sentence on the page beginning with "All Grower beds ..."; delete the sentence and replace it with, "The other Grower beds will be subject to the allocation analysis below."

2. At slip op. 830, first full paragraph; 135 F.3d at 640, third full paragraph beginning with "We therefore apply ... "; delete the entire paragraph and replace it with a new paragraph and revised footnote as follows:

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* The Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

"We therefore apply the following analysis to Grower beds where the Growers, or their predecessors, began their enhancement efforts on a natural bed. For such natural beds, the Growers shall demonstrate what portion of their harvest is due to their labor, as opposed to what portion would exist absent the Growers' enhancement. See Shellfish II., 898 F.Supp. at 1462. For such enhanced natural beds, the Tribes shall be entitled to fifty percent of the pre-enhanced sustainable shellfish production from those beds.[12] Of course, this allocation analysis does not apply to artificial beds, that is, to Grower beds that did not support a sustainable commercial density of shellfish prior to cultivation. As the Tribes have acknowledged, the Tribes have no right to harvest such beds. 898 F.Supp. at 1460-61."

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[12] For example, if ten clams per square foot were a density sufficient to support a commercial livelihood at the time that enhancement began, and if a 100 square foot Grower's bed yielded ten clams per square foot prior to the Grower's efforts to enhance the output (1,000 clams), and that same bed now produces fifty clams per square foot as a result of the Grower's labor (5,000 clams), the Tribes would be entitled to fifty percent of the 1,000 clams or 500 clams.

3. At slip op. 834, third full paragraph carrying over to p. 835; 135 F.3d at 642, third full paragraph beginning with "The Tribes argue ..."; delete the paragraph and replace it with five paragraphs as follows:

"Of particular concern to the Tribes is the restriction that allows the Growers to control access to natural clams by choosing not to harvest them in favor of the oysters under which the clams are found. The Tribes describe this restriction as a "gaping loophole" that has the capacity at the Growers' discretion to deny to them the very rights to natural clams which our holding confirms.

The Growers' counter with the argument from the record that the process of harvesting natural clams from underneath the oyster beds can seriously disrupt and suffocate their oysters.

On reflection, the Tribes' concerns although certainly not fanciful-are based at this point on

speculation as to what might happen in the future. The Growers, for example, represent that "where there are substantial economic benefits to a Grower from harvesting clams, the Grower will do so." And, "[a]s soon as the Grower does, the trial court's implementation plan provides that the Tribes have the right to a share of those clams." The Growers say that they are "commercial farmers-if there is money to be made, the resource assuredly will be exploited."

Under the circumstances, we believe that the district court's restrictions do not amount at this time to an abuse of discretion. The district court attempted to fashion a prospective solution to a difficult situation by balancing the parties' respective interests. The district court's restrictions safeguard the Tribes' right of access to the ancient fisheries, but also protect the interests of the Growers and Private Owners. Importantly, in this aspect of the court's decision the court did not use equity as the basis for its interpretation of the decision, but only as a way to implement its correctly reasoned interpretation of the Proviso. While the Tribes may not be happy with the limits imposed on their harvesting, they are still able to effectuate their allocation under the Treaties and are not excluded from their ancient fisheries.

We are confident that any future practices by the Growers that trench inappropriately upon the Tribes' rights as confirmed in this opinion will be adequately dealt with by the district court. The district court is the best place to manage any wrinkles that might crop up. The best way to avoid such problems, of course, is for the parties constructively to work together to respect each others' rights."

4. At slip op. 839, concurring opinion of Judge Beezer; 135 F.3d at 644; withdraw the entire opinion and replace with a new concurring opinion as reflected in the amended opinion filed herewith.

With these amendments, the panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R.App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

I. OVERVIEW

The State of Washington, groups of private tideland property owners ("Private Owners"), and commercial shellfish growers ("Growers") (collectively, "Appellants") appeal the district court's judgment following two bench trials in an action brought by numerous Indian Tribes[1] (the "Tribes") and the United States (on the Tribes' behalf) seeking a declaration of rights to shellfish under the Stevens Treaties ("Treaties"). The United States and the Tribes cross-appeal the district court's order implementing the Tribes' rights.

In 1855, the United States negotiated five Treaties with the Tribes in the Western Washington Territory. The Tribes ceded their aboriginal lands to the United States for settlement, receiving in exchange exclusive title to defined lands, free medical care, schools, occupational training, and annuity payments. The Treaties also reserved to the Tribes the "right of taking fish, at all usual and accustomed grounds and stations ... in common with all citizens of the Territory...." In a series of decisions beginning in 1974, federal courts, including the Ninth Circuit and the Supreme Court, held that this treaty language entitles the Tribes to take fifty percent of the salmon and other free-swimming fish in the waters controlled by Washington State. The Tribes' rights to shellfish under the Treaties, however, are limited by the following proviso (the "Shellfish Proviso"): "Provided, however, That they shall not take shellfish from any beds staked or cultivated by citizens."

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[1] The Tribes are the following: the Tulalip, Puyallup, Squaxin Island, Makah, Muckleshoot, Upper Skagit, Nooksack, Nisqually, Lummi, Skokomish, Port Gamble S'Klallam, Lower Elwha S'Klallam, Jamestown S'Klallam, Suquamish, Swinomish, Hoh, Stillaguamish, Sauk Suiattle, and Quileute. The Yakima Tribe, which participated in the proceedings below, did not appeal the district court's decision that the right to take shellfish is not reserved in its treaty with the United States.

This case concerns the nature and extent of the Tribes' shellfishing rights under the Treaties. The district court concluded in a thoughtful and well-reasoned opinion that the term "fish," as used in the Stevens Treaties, includes shellfish. The court then concluded that the Tribes have a right to take one half of the harvestable shellfish of every species found anywhere within their usual and accustomed fishing areas, except as expressly limited by the Shellfish Proviso. The court interpreted the Shellfish Proviso "only to exclude Indians from artificial, or planted shellfish beds; [the parties to the Treaties] neither contemplated nor desired that the Indians would be excluded from natural shellfish beds." *United States v. Washington*, 873 F.Supp. 1422, 1441 (W.D. Wash. 1994). The court's conclusions substantially reflect the position of the Tribes and of the United States, which the court found to be "overwhelmingly" supported by the historical evidence of the intent of the signatory parties to the Treaties.

After its decision interpreting the Treaties, the district court held a second trial to determine a plan for implementing the Tribes' shellfishing rights ("Implementation Plan"). Employing principles of equity, the court refined its definition of "cultivated" under the Proviso and precluded the Tribes from harvesting shellfish on most of the commercial Growers' property. In addition, the court placed time, place, and manner restrictions on the Tribes' ability to harvest from privately-owned land. Finally, the court devised a system for the appointment and removal of Special Masters to resolve disputes arising from the Implementation Plan. These consolidated appeals followed.

We have jurisdiction under 12 U.S.C. § 1291, and we affirm in part and reverse in part.

II. HISTORICAL BACKGROUND

A. The Stevens Treaties

The record contains extensive persuasive evidence concerning the Tribes' reliance on fish and shellfish for commercial, subsistence, and ceremonial purposes. Fishing was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). The United States Treaty negotiators, under the leadership of Governor Isaac Stevens, were well aware of the Tribes' use and reliance on a wide variety of fish, including shellfish. "The United States' primary purpose [in entering the

Treaties] was to extinguish the Indians' title to the lands in Western Washington, thereby clearing the way for settlement by Europeans." *United States v. Washington*, 873 F.Supp. 1422, 1436 (W.D. Wash.1994) [hereinafter "*Shellfish I*"]. Because of the Tribes' extensive reliance on fish, however, "[t]he United States was aware that ... it was clearly necessary to preserve the Indians' fishing rights." *Id.* "Whatever land concessions [the Tribes] made, the Indians viewed a guarantee of permanent fishing rights as an absolute predicate to entering into a treaty with the United States." *Id.* at 1437.

At the time of the Treaties, a shellfish-cultivation industry had begun to develop at Shoalwater Bay in the Washington Territory. The United States treaty negotiators were familiar with the practices of that industry, which was modeled after the larger, older, and more developed shellfish industry on the East Coast of the United States. *Id.* at 1434. Shellfish farmers created "cultivated" beds (ones on which shellfish spawn would not naturally set) by removing oysters from their natural beds to areas where they could grow more rapidly, or by placing shells or other material to harden the bottom and thereby facilitate the setting of the oysters. In addition to creating cultivated beds, shellfish farmers frequently "staked" beds of shellfish by storing market-sized shellfish removed from other beds until they could be shipped to market. These staked beds did not naturally contain shellfish of the type being stored, and their boundaries were marked for identification purposes with stakes extending above the surface of the water at high tide. *Id.* at 1432-37.

Fish, including shellfish, were exceptionally abundant and considered inexhaustible at treaty time. *Id.* at 1438. Hence, the United States negotiators believed that preserving Indian fishing rights would not interfere with the rights of citizens. The "negotiators were aware of the thriving shellfish industry in fully-developed East Coast cities, and likely assumed based on those examples that development in the Puget Sound and on the western shore would not interfere with the Indians' exercise of their treaty fishing rights." Id.

In light of the above, the United States negotiated five treaties with Indian Tribes of the Western Washington Territory in 1854 and 1855.[2] Through each of these Treaties, in substantially

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[2] Each of the Tribes involved in this proceeding is the successor-in-interest to one or more of these treaties: Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, January 22, 1855, 12

identical language, the Tribes secured their preexisting right to take fish:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shell fish from any beds staked or cultivated by citizens....

Treaty of Medicine Creek, supra, Art. III.

B. Post-Treaty Developments

In the years immediately following the Treaties, the Indians harvested the majority of the shellfish resource. In 1879, however, the territorial legislature passed a law that, for the first time, allowed citizens the exclusive right to use and harvest natural oyster beds. *Shellfish I*, 873 F.Supp. at 1440. "Washington became a state in 1889, and in 1895 it passed legislation (the 'Bush' and 'Callow' Acts) for private purchase of tidelands, even when those tidelands contained natural shellfish beds." *Id.* Since that time, the State has sold off the "vast majority" of its tidelands to private owners. *Id.* at 1439.

Uncontradicted evidence at trial showed that native shellfish populations have declined dramatically and have been replaced to a large extent by foreign species introduced into the area after the Treaties. For example, native littleneck clams have been replaced by the introduced species, manila clams, which comprised over eighty percent of the total clam harvest in the Puget Sound from 1988-90. This litigation–initiated by the Tribes and United States–is the consequence of the increasing competition for, and depletion of, the shellfish resource.

Stat. 927; Treaty of Point No Point, January 26, 1855, 12 Stat. 933; Treaty with the Makah, January 31, 1855, 12 Stat. 939; Treaty of Olympia, July 1, 1855, 12 Stat. 971.

III. PROCEDURAL HISTORY

In 1970, the United States and the Tribes brought suit against the State of Washington seeking an interpretation of the Treaties and an injunction to enforce the Tribes' fishing rights. *See United States v. Washington*, 384 F.Supp. 312, 327 (W.D. Wash.1974) [hereinafter "*Washington I*"].

In *Washington I*, Senior Judge Boldt determined the nature and extent of the Tribes' off-reservation fishing rights with respect to anadromous fish.[3] That decision established the locations of the Tribes' usual and accustomed grounds and stations and found that the Tribes were entitled to take fifty percent of the harvestable fish from those grounds and stations. We affirmed in *United States v. Washington*, 520 F.2d 676 (9th Cir.1976) [hereinafter "*Washington II*"]. The Supreme Court substantially affirmed that decision, concluding that the trial court had correctly adjudicated the nature and extent of the Tribes' fishing rights. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) [hereinafter "*Fishing Vessel*"]. The Supreme Court's decision in *Fishing Vessel* marks the seventh time that the Supreme Court has addressed the fishing clause of the Stevens Treaties.[4]

The district court in *Washington I* reserved jurisdiction to hear future unresolved issues arising out of the Treaties. Under the court's procedures, the Tribes must bring a request for adjudication of their fishing rights to the court's attention through the filing of a "Request for Determination." *Washington I*, 384 F.Supp. at 419.

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[3] Anadromous fish are fish that migrate up rivers from the sea to breed in fresh water (i.e., salmon).

[4] The other six cases are: *United States v Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905); *Seufert Bros Co. v United States*, 249 U.S. 194, 39 S.Ct. 203, 63 L.Ed. 555 (1919); *Tulee v Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942); *Puyallup Tribe v Department of Game*, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968); *Department of Game v. Puyallup Tribe*, 414 U.S. 44, 94 S.Ct. 330, 38 L.Ed.2d 254 (1973); *Puyallup Tribe v. Department of Game*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977). None of these cases involved interpretation of the Shellfish Proviso.

In 1989, pursuant to the above procedure, sixteen Indian Tribes, later joined by the United States, filed an action in the district court seeking a declaration of the nature and extent of their shellfishing rights.[5] The district court's decision in *Shellfish I* interpreted the Treaties to award fifty percent of the shellfish harvest in Washington waters to the Tribes.

After announcing its decision in *Shellfish I*, the court conducted a six-day "implementation trial." The purpose of the implementation trial was to receive evidence regarding proposed plans to implement *Shellfish I*. Parties submitted competing plans. On August 28, 1995, the district court announced its Implementation Plan. *United States v. Washington*, 898 F.Supp. 1453 (W.D. Wash.1995) [hereinafter "*Shellfish II*"]. In *Shellfish II*, the district court noted that "[t]he Shellfish Growers and Private Property Owners are, effectively, innocent purchasers who had no notice of the Tribes' Treaty fishing right when they acquired their property." *Id.* at 1457. "Consequently, it is incumbent upon this Court to use its equitable powers to effect a balance between the Tribes' Treaty shellfishing right and the Growers' and Owners' interest in the peaceful enjoyment and/or commercial development of their property." *Id.* The district court then made several important rulings.

First, the court ruled that, when the State acts on behalf of its citizens by developing artificial shellfish beds for recreational shellfishing on state-owned tidelands, it is a "citizen" within the scope of the shellfish proviso, which exempts tribal harvesting from "beds staked or cultivated by citizens." *Id.* at 1459-60. The effect of this ruling is to exclude the Tribes from shellfishing in state-created artificial beds.

Second, the court clarified the definition of a "natural shellfish bed" which may not be "staked or cultivated" in the future

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[5] The action was originally filed against only Washington. The following groups subsequently intervened in the proceeding: the Puget Sound Shellfish Growers, representing commercial shellfish growers; the Alexander group and Adkins group of private tideland owners; and a group of private property owners affiliated with the United Property Owners of Washington ("UPOW"). The district court denied motions to intervene filed by the Inner Sound Crab Association, Dungeness Crab Harvesters Association, and the Washington Harvest Divers Association. That ruling was recently affirmed by this Court. *See United States v Washington*, 86 F.3d 1499 (9th Cir.1996).

by the Growers. The court concluded that a "natural shellfish bed" is a "bed which is capable of sustaining a yield of shellfish that will support a commercial livelihood." *Id.* at 1461. The court then found that the minimum density of manila clams that will support a commercial livelihood is 0.5 pounds of mature clams per square foot.

Third, the court redefined "artificial beds," which are exempted by the Shellfish Proviso from the reach of the Tribes' shellfishing rights. The court believed that it would be "very difficult" to determine whether beds on Growers' properties were "artificial" or "natural" and that the Tribes should not benefit from the Growers' efforts to enhance the shellfish resource on their own properties. *Id.* at 1461-62. The court therefore modified the definition of "cultivated" to encompass the "wide range of techniques used by the Growers to enhance production of shellfish on their property." *Id.* The court referred to these beds as "de facto artificial beds." *Id.* at 1462 & n. 18. Under the court's ruling, only "those beds whose existence is entirely due to the natural propagation of the species" are subject to the Tribes' Treaty rights. *Id.* at 1462.

Fourth, the court imposed "time, place, and manner" restrictions on the Tribes' right to shellfish on private properties. *Id.* at 1470-73. One such restriction was a blanket ban on upland access across private property absent consent by the owner.

The court also set forth dispute resolution procedures, calling for a panel of four special masters: one selected by the Tribes, one by the Growers, one by the Private Owners, and one by the State. *Id.* at 1475-76. A single master, drawn from the four, determines each dispute. Under the court's decision, the masters have the power to award damages against Tribes who violate the Implementation Plan. Id.

In response to motions to reconsider its decision in *Shellfish II*, the district court amended its decision on December 18, 1995. *United States v. Washington*, 909 F.Supp. 787 (W.D. Wash.1995) [hereinafter "*Shellfish III*"]. In *Shellfish III*, the court revised its ban on upland tribal access to shellfish beds absent consent of the landowner by allowing tribes to cross private land after a showing of "the absence of access by boat, public road, or public right-of-way." *Id.* at 793. Disputes over access must be presented to a special master. *Id.* at 791-93. The court also changed its decision allowing

the special master to award damages against the Tribes. The master is still able to award damages against individual tribal members who damage private property during exercise of fishing rights, but he or she cannot award damages against the Tribes themselves. *Id.* at 793-94.

IV. STANDARD OF REVIEW

All parties agree that the meaning of the Treaty language is ultimately a question of law reviewed de novo. *United States v. Washington*, 969 F.2d 752, 754 (9th Cir.1992). Although several Private Owner groups assert that the district court's findings regarding the "negotiators' intentions and expectations" are mixed issues of law and fact reviewed de novo, we have previously reviewed a district court's findings of parties' intent in entering Indian Treaties "[u]nder the highly deferential clear error standard." *See, e.g., Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 343 (9th Cir.1996), cert. denied, — U.S. – –, 117 S.Ct. 1432, 137 L.Ed.2d 540 (1997). We therefore review for clear error all of the district court's findings of historical fact, including its findings regarding the treaty negotiators' intentions. We then review de novo whether the district court reached the proper conclusion as to the meaning of the Shellfish Proviso given those findings.

We review for an abuse of discretion the district court's equitable orders. The district court abuses its discretion when its equitable decision is based on an error of law or a clearly erroneous factual finding. *Foster v. Skinner*, 70 F.3d 1084, 1087 (9th Cir.1995).

V. CANONS OF TREATY CONSTRUCTION

"[A]ll Treaties made, ... under the Authority of the United States, shall be the supreme Law of the Land and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. The goal of treaty interpretation is to determine what the parties meant by the treaty terms. *Shoshone Indians v. United States*, 324 U.S. 335, 353, 65 S.Ct. 690, 89 L.Ed. 985 (1945). "[I]t is the intention of the parties ... that must control any attempt to interpret the treaties." *Fishing Vessel*, 443 U.S. at 675. This analysis of the parties' intentions "begin[s] with the text of the treaty and the context in which the written words are used." *Eastern*

Airlines, Inc. v. Floyd, 499 U.S. 530, 534, 111 S.Ct. 1489, 113 L.Ed.2d 569 (1991) (internal quotations and citations omitted). "'[T]reaties are constructed more liberally than private agreements, and to ascertain their meaning we may look beyond written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Id.* at 535 (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32, 63 S.Ct. 672, 87 L.Ed. 877 (1943)).

The Shellfish Proviso is an exception to the Tribes' broad fishing rights. "A proviso is strictly construed, and only those subjects expressly restricted are freed from the operation of the statute." *Sutherland on Statutory Construction*, § 20.22, at 110 (5th ed.1992).

Courts have uniformly held that treaties must be liberally construed in favor of establishing Indian rights. *Confederated Tribes of Chehalis*, 96 F.3d at 340. "Any ambiguities in construction must be resolved in favor of the Indians." *Id.* (citation omitted). "These rules of construction 'are rooted in the unique trust relationship between the United States and the Indians.'" *Id.* (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985)).

VI. DISCUSSION

A. EXCEPT AS LIMITED BY THE SHELLFISH PROVISO, THE RIGHT OF TAKING SHELLFISH UNDER THE TREATIES IS COEXTENSIVE WITH THE RIGHT OF TAKING FISH.

The district court held that the Treaties grant the Tribes a right to take shellfish of every species found anywhere within the Tribes' usual and accustomed fishing areas, except as expressly limited by the Shellfish Proviso. We agree.

1. The Tribes' shellfish rights are not limited by species.

The State of Washington argues that the Tribes' right to take shellfish is limited to those species of fish actually harvested by the

Tribes prior to the signing of the Treaties.[6] Specifically, Washington contends that the tribes have no Treaty right to certain "deep-water" species[7] of shellfish that were not historically harvested in shallower waters and on tidelands. We respectfully reject this contention because it is plainly inconsistent with the language of the Treaties, the law of the case, and the intent and understanding of the signatory parties. *See Shellfish I*, 873 F.Supp. at 1430.

With all deference to the State, there is no language in the Treaties to support its position: the Treaties make no mention of any species-specific or technology-based restrictions on the Tribes' rights. The district court aptly noted that, had the Treaty parties intended to limit the harvestable species, the parties would not have chosen the word "fish." The word "fish" has "perhaps the widest sweep of any word the drafters could have chosen." *Id.* Thus, the district court correctly chose not to "deviate from [the Treaties'] plain meaning." *Id.*

Washington's position is also contrary to the law-of-the-case doctrine. In 1974, Judge Boldt rejected an argument similar to Washington's current position, stating: "The right secured by the treaties to the Plaintiff tribes is not limited as to species of fish, the origin of fish, the purpose or use or the time or manner of taking...." *Washington I*, 384 F.Supp. at 401. Moreover, the court determined that the Treaties "do not prohibit or limit any specific manner, method, or purpose of taking fish." *Id.* at 402. We previously affirmed these conclusions "in all respects," *Washington II*, 520 F.2d at 693, and we continue to believe they are correct.

Washington relies heavily on the Supreme Court's statement in *Fishing Vessel* that "securing" fishing rights is "synonymous with 'reserving' rights previously exercised." 443 U.S. at 678 (emphasis added). Washington's contention, however, is contrary to the recognized principle that the Treaties involved a grant of rights from the Indians to the United States. *United States v. Winans*, 198 U.S. 371, 380-81, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). In *Winans*, the

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[6] The State of Oregon has filed an amicus brief joining Washington in this argument.

[7] The deep-water species include: geoduck (pronounced "gooey duck"—a kind of giant clam), sea urchin, sea cucumber, and certain species of crab and shrimp.

Supreme Court upheld the Indians' right of access over private property in order to fish in the Columbia River. *Id.* at 384. The Court construed the fishing rights in the Stevens Treaty as "not a grant of rights to the Indians, but a grant of rights from them-a reservation of those not granted". *Id.* As the district court explained:

> At [Treaty] time, ... the Tribes had the absolute right to harvest any species they desired, consistent with their aboriginal title.... The fact that some species were not taken before treaty time-either because they were inaccessible or the Indians chose not to take them-does not mean that their right to take such fish was limited. Because the "right of taking fish" must be read as a reservation of the Indians' pre-existing rights, and because the right to take any species, without limit, pre-existed the Stevens Treaties, the Court must read the "right of taking fish" without any species limitation.

Shellfish I, 873 F.Supp. at 1430 (citation omitted). A more restrictive reading of the Treaties would be contrary to the Supreme Court's definitive conclusion that the Treaties are a "grant of rights from" the Tribes. *Winans*, 198 U.S. at 380. We therefore reject Washington's argument that the Tribes are limited in the species of shellfish they harvest.

2. The "usual and accustomed grounds and stations" do not vary by species of fish.

Appellants argue that the district court erred in holding that the right of taking fish within "all usual and accustomed grounds and stations" of a Tribe does not vary by species of fish. They contend that the Tribes' "usual and accustomed" fishing grounds for shellfish are not coextensive with the usual and accustomed grounds for the taking of other fish, the boundaries of which were determined in *Washington I*. They suggest that the Tribes must establish their usual and accustomed grounds for each species of fish. We respectfully disagree.

In *Washington I*, the court found that "every fishing location where members of a tribe customarily fished ... is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to fish." 384 F.Supp. at 332. That court heard extensive evidence and made findings with respect to each Tribes' usual and accustomed fishing grounds. *Id.* at 359-82. Since the time Judge Boldt made these findings, courts considering

fishing disputes under the Treaties have never required species-specific findings of usual and accustomed fishing grounds. In fact, the district court in a prior proceeding on a related Stevens Treaties case found that the usual and accustomed grounds and stations for herring (a non-anadromous fish) were co-extensive with those previously adjudicated for salmon (an anadromous fish). *United States v. Washington*, 459 F.Supp. 1020, 1049 (W.D. Wash.1978) (ruling that the tribes may take herring at all of its usual and accustomed fishing places to the same extent and subject to the same terms and conditions as specified in *Washington I*).

Moreover, it would be extremely burdensome and perhaps impossible for the Tribes to prove their usual and accustomed grounds on a species-specific basis. "Little documentation of Indian fishing locations in and around 1855 exists today." 459 F.Supp. at 1059. If each Tribe were required to prove its usual and accustomed grounds for every species of fish and shellfish, the time and cost to the court and parties would be unreasonably burdensome.

In light of the above, the district court was correct in concluding that the Tribes' usual and accustomed grounds for shellfish are co-extensive with the Tribes' usual and accustomed fishing grounds, which have been previously decided by the courts.

3. The Equal Footing Doctrine does not preclude tribal harvesting.

Appellants contend that the "Equal Footing Doctrine" and the "Shively presumption" preclude tribal harvesting on the tidelands. "Under the Equal Footing Doctrine, every new state is entitled to entrance into the Union free of any encumbrance on its land, so that it stands on 'equal footing' with the other states." *Shellfish I*, 873 F.Supp. at 1442-43 (citing *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894)). "The *'Shively* presumption' is an outgrowth of this doctrine, and holds that any pre-statehood grant of property does not include tidelands unless the grant clearly indicated that tidelands were included." *Id.* at 1443 (citation omitted). We conclude that the language of the Treaties, the law of this case, and the Supreme Court's prior applications of the Equal Footing Doctrine all counsel against its application in the instant case.

In short, Appellants contend that any treaty right to harvest shellfish would amount to a property interest in the tidelands, and because the Treaties do not clearly specify an intent to grant a

property interest in the tidelands, the Treaties cannot be construed as providing rights to harvest shellfish. The district court rejected this argument and interpreted the Treaties "without regard to the Equal Footing Doctrine or the Shively presumption." *Id.* We agree with the district court's interpretation.

Appellants rely primarily on two cases, *United States v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926), and *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). Both cases involved disputes over Indian title rights to lands underlying navigable waters. In both cases, the Supreme Court applied the *Shively* presumption and concluded that the treaties at issue "did not by [their] terms formally convey any land to the Indians at all." *Montana*, 450 U.S. at 553. In *Holt State Bank*, the Court concluded "there was nothing in [the treaties] which even approaches a grant of rights in lands underlying navigable waters." 270 U.S. at 58.

In the instant case, however, "the Tribes possess the disputed rights [to harvest shellfish] pre-treaty, and the treaty simply effects a reservation of rights." 873 F.Supp. at 1443. As the district court stated:

> It is settled under *Washington II* that the fishing rights at issue in this case predated the Stevens Treaties, and the Treaties simply effected a reservation of those rights. Similarly, the Supreme Court acknowledged the reservation in *Fishing Vessel*: "The fishing clause speaks of 'securing' certain fishing rights, a term the Court has previously interpreted as synonymous with 'reserving' rights previously exercised." *Fishing Vessel*, 443 U.S. at 678. Because the Stevens Treaties must be construed as a reservation of rights by the Tribes, not a granting of rights by the United States, the Shively presumption and the Equal Footing Doctrine cannot play a role in the evaluating the existence or scope of the rights.

Id. at 1443-44 (citation omitted). We adopt the district court's persuasive reasons for rejecting the application of the Shively presumption to defeat the Tribes' shellfishing rights.

We note that "the Supreme Court has applied the Equal Footing Doctrine in one context only, namely when evaluating a

claim of right to lands beneath navigable waters based upon an alleged conveyance or retention of fee simple ownership by the United States prior to statehood." *Id.* at 1444 (citing cases); see *Montana*, 450 U.S. at 550-51 ("The question is whether the United States conveyed beneficial ownership of the riverbed to the Crow Tribe by the Treaties of 1851 or 1868."); *Holt State Bank*, 270 U.S. at 57 (adjudicating the question of "whether the lands under the lake were disposed of by the United States before Minnesota became a state"); *Utah Div. of State Lands v. United States*, 482 U.S. 193, 204, 107 S.Ct. 2318, 96 L.Ed.2d 162 (1987) (The United States answered in the district court that title to the lakebed remained in federal ownership by selection of the lake as a reservoir site prior to Utah's statehood). Unlike the above cases, the instant case does not involve ownership of tidelands. The Tribes do not claim ownership of the tidelands; the Tribes merely assert their right to harvest shellfish within the tidelands, regardless of ownership.

Moreover, application of the Equal Footing Doctrine has already been rejected in the context of the Stevens Treaties fishing rights. First, the Supreme Court in Winans noted:

> [I]t is contended that the State acquired, by its admission into the Union "upon an equal footing with the original States," the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the paramount authority of Congress with regard to public navigation and commerce. The United States, therefore, it is contended, could neither grant nor retain rights in the shore or to the lands under water.
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> * * *
>
> The extinguishment of the Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places."

198 U.S. at 382-84. Similarly, Appellants' Equal Footing arguments have been rejected in this case:

> Admission of the State of Washington into the Union upon an equal footing with the original states had no effect upon the treaty rights of the Plaintiff tribes. Such admission imposed upon the State, equally with other states, the obligation to observe and carry out the provisions of treaties of the United States.

Washington I, 384 F.Supp. at 401. Thus, we can identify no reason or rule that would mandate the application of the Equal Footing Doctrine to limit the Tribes' fishing rights in this case. The language of the Treaties, the law of this case, and the Supreme Court's prior applications of the Equal Footing Doctrine all preclude its application here.

4. The Tribes are entitled to harvest shellfish on privately-owned tidelands.

The Private Owners contend that the Tribes' right to take shellfish does not include the right to take shellfish found on privately-owned tidelands. The Private Owners argue that the Treaties gave the Tribes the same common right to harvest shellfish as that enjoyed by non-Indian citizens, and that this common right was diminished by the conveyance of the property into private ownership. They contend also that the Treaties only allow the Tribes to take the common resources of "public water and public lands," not to take shellfish on private lands. We reject these contentions.

First, the Supreme Court has consistently rejected arguments to the effect that Indian treaties reserve to the Indians no more fishing rights than those enjoyed by non-Indian citizens. *See Winans*, 198 U.S. at 380 (rejecting lower court ruling that Indians had no more rights than any inhabitant of the Territory); *Fishing Vessel*, 443 U.S. at 676-77 & n. 22 (rejecting argument that Indians only possessed rights in common with other citizens).

Second, as the Supreme Court explained in Winans, the Tribes were promised "the right of taking fish at all usual and accustomed places" and the right "of erecting temporary buildings for curing them." 198 U.S. at 381. "The contingency of future ownership of the lands, therefore, was foreseen and provided for" and, "in other words, the Indians were given a right in the land." *Id.* *Winans* directly contradicts the Private Owners' argument: the Supreme Court has made clear that the Tribes' fishing rights in their usual and accustomed places are not diminished by private

ownership of those lands. In fact, the Court noted that the Treaties "imposed a servitude upon every piece of land as though described therein." Id.

Moreover, in *Fishing Vessel*, the Supreme Court explicitly recognized that the "[T]reaties provide Indians with certain rights—i.e., the right ... to cross private lands—that non-Indians do not have." *Fishing Vessel*, 443 U.S. at 676 n. 22. The district court acknowledged this right in *Shellfish III* and correctly concluded that:

> [U]pon proper showing of the need for land access, the Tribes would be entitled under Winans to cross private property in order to exercise their fishing rights. Resolving the issue of Tribal access across private property requires the balancing of competing interests, and the Court emphasizes that land access is not to be granted unless there is a proper showing of the need for such.

909 F.Supp. at 792.

This case is not the first Stevens Treaties case to implicate private property rights. The previous fishing rights cases, upheld in *Fishing Vessel*, noted that the Treaties "include[ ] the right to use private tidelands for beach seines, tidal impoundment traps, stake nets and reef nets." *Shellfish I*, 873 F.Supp. at 1444; see *Washington I*, 384 F.Supp. at 360-61, 378. Appellants' attempts to distinguish the anadromous fishing rights from the shellfishing rights are not persuasive. The Supreme Court has said that "[i]t is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter should be excluded from their ancient fisheries, and it is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish." *Fishing Vessel*, 443 U.S. at 676.

The Private Owners also contend that shellfish are different than anadromous fish because they have traditionally been held to be a part of the land. The district court rejected this contention, stating that "the uniform common law at treaty time held that private ownership of a parcel of tideland did not include private rights to the shellfish on that parcel." *Shellfish I*, 873 F.Supp. at 1439. In support of this proposition, the district court cited Joseph Angell's 1847 Treatise on the Right of Property in Tide Waters, which states that "[t]here is no doubt, that the public have a right to take shellfish

on the shore, though the right of soil in the shore happens to be private property."

On appeal, both the Tribes and the Private Owners cite several cases in support of their respective contentions that the right to harvest shellfish from private property was (or was not) permitted at Treaty time. *See Smith v. Maryland*, 59 U.S. (18 How.) 71, 74-75, 15 L.Ed. 269 (1855) (stating that "the enjoyment of certain public rights" included "the common liberty of taking fish, as well shellfish as floating fish"); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 413-14, 10 L.Ed. 997 (1842) (noting that public rights applied "as well for shell-fish and floating fish"). *But see Den v. The Jersey Co.*, 56 U.S. 426, 432-33, 15 How. 426, 14 L.Ed. 757 (1853) ("Clams ordinarily live in the soil under the waters, and not within the waters.... They therefore, in a very material sense, belong with the land."). Regardless of whether shellfish were a private or public resource at treaty time, or today, the Treaties secured the Tribes' right to fish at their usual and accustomed grounds and stations. The Tribes therefore acquired the right to take shellfish from the tidelands within their usual and accustomed grounds, without regard to the public or private nature of their ownership. As the district court stated in *Washington I*, "[b]ecause the right of each treaty tribe to take anadromous fish arises from a treaty with the United States, that right is reserved and protected under the supreme law of the land, does not depend on state law, is distinct from rights or privileges held by others, and may not be qualified by any action of the state." 384 F.Supp. at 402. Thus, whatever the status of the state law at the time of the Treaties or today, the Treaties represent the supreme law of the land and give to the Tribes the right to take shellfish from private tidelands. *See Fishing Vessel*, 443 U.S. at 682 (stating that "neither party to the treaties may rely on the State's regulatory powers or on property law concepts to defeat the other's right to a 'fairly apportioned' share of each covered run of harvestable anadromous fish") (emphasis added).

In light of *Winans*, *Fishing Vessel*, and the Treaties' language and power as the supreme law of the land, the district court correctly determined that the Tribes have a right to harvest shellfish on private tidelands.

B. THE DISTRICT COURT PROPERLY INTERPRETED THE MEANING OF THE SHELLFISH PROVISO.

The Treaties' fishing clauses were expressly limited by the Shellfish Proviso, which prohibited the Tribes from taking shellfish

from "any beds staked or cultivated by citizens." The district court "interpret[ed] the terms 'staked' and 'cultivated' as the terms were defined and used in the shellfishing industry at and before treaty time." 873 F.Supp. at 1441. The district court concluded that, when the signatory parties used those terms in the Proviso, "they intended only to exclude Indians from artificial, or planted, shellfish beds; they neither contemplated nor desired that the Indians would be excluded from natural shellfish beds." *Id.* "Therefore, the words 'any beds staked or cultivated by citizens,' describe artificial shellfish beds created by private citizens." Id.

The Growers offered the district court an alternative definition of staked or cultivated that "starts and ends with the treaty-time dictionary." *Id.* at 1431. The district court noted that under the Growers' theory, "any shellfish bed extant today that is surrounded by stakes, or in some fashion improved by human labor, would be off limits to the Indians." *Id.* The Private Owners make a similar contention, arguing that "'staked' should be interpreted in its 'frontier' context and thus should be regarded as a synonym for 'claimed as private property.' Therefore, all privately-owned tideland, whether or not surrounded by stakes, would be protected by the Shellfish Proviso." *Id.* The district court rejected the Growers' and Private Owners' definitions, analyzing the Shellfish Proviso in light of: (1) the surrounding treaty words, (2) the record of the treaty negotiations, (3) the historical circumstances that gave rise to the Stevens Treaties, (4) the possible alternative formulations of the Shellfish Proviso, and (5) the post-treaty conduct of both parties. *Id.* at 1435. In short, the court found that "the Tribes presented compelling evidence that only artificial beds were 'staked' or 'cultivated' at treaty time." *Id.* at 1431-42. Given the deferential standard by which we review the district court's findings of historical fact and its findings regarding the intentions of the parties' negotiators, we conclude the district court did not err in interpreting the Proviso and we adopt its analysis as our own. Moreover, we believe that the district court's reasoned analysis of the Proviso is correct. We emphasize three additional points.

First, the Growers' and Private Owners' interpretations are not based on the common understanding of the phrase "beds staked or cultivated" within the context of the shellfishing industry at treaty time. The district court made a factual finding that the treaty negotiators drew the language of the Shellfish Proviso from terms commonly used in the fledgling shellfishing industry. Although the Growers may have presented evidence to the contrary, none of this evidence leaves us with a "definite and firm conviction" that a

mistake has been committed. *See Sawyer v. Whitley*, 505 U.S. 333, 346 n. 14, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). It was therefore not clear error for the district court to have rejected Appellants' interpretation and to have adopted the Tribes' position.

Second, the Growers' interpretation is totally inconsistent with the "United States' avowed intention to preserve for the Indians their ancient fisheries." *Id.* at 1437. The Growers' and Private Owners' interpretations would read the Proviso to effectively eliminate the Tribes' right to take shellfish under the Treaties. Surely, Governor Stevens would not have intended such a result, especially in light of the historical circumstances surrounding the Treaties' negotiations. In fact, the benevolent approach taken by the United States treaty negotiators was noted by the Supreme Court in *Fishing Vessel*:

> Governor Stevens made the following statement to the Indians gathered at Point-No-Point to negotiate the treaty bearing that name: "Are you not my children and also children of the Great Father? What will I not do for my children, and what will you not for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? ... This paper secures your fish. Does not a father give food to his children?"

443 U.S. at 667 n.11 (emphasis added). Likewise, the district court in this case aptly noted:

> The one significant promise for purposes of this litigation is the promise by the United States to the Indians that they would enjoy a permanent right to fish as they always had. This right was promised as a sacred entitlement, one which the United States had a moral obligation to protect. The Indians were repeatedly assured that they would continue to enjoy the right to fish as they always had, in the places where they had always fished. There is no indication in the minutes of the treaty proceedings that the Indians were ever told that they would be excluded from any of their ancient fisheries.

Shellfish I, 873 F.Supp. at 1435. Were we to adopt the Growers' definition of staked or cultivated, we would be providing "an

impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more." *Winans*, 198 U.S. at 380.

Third, the Appellants' interpretation of the Proviso casts aside black-letter canons of statutory construction and treaty interpretation. The Shellfish Proviso is an exception to the Tribes' otherwise broad fishing rights. "A proviso is strictly construed, and only those subjects expressly restricted are freed from the operation of the statute." *Sutherland on Statutory Construction*, § 20.22, at 110 (5th ed.1992). Moreover, courts have uniformly held that treaties must be liberally construed in favor of the Indians. *Confederated Tribes of Chehalis*, 96 F.3d at 340. "These rules of construction 'are rooted in the unique trust relationship between the United States and the Indians.'" *Id.* (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985)). The Appellants' interpretation of the Proviso would render meaningless the above canons of construction and interpretation.

C. THE DISTRICT COURT CORRECTLY REJECTED APPELLANTS' AFFIRMATIVE DEFENSES.

The Growers contend that we should apply the doctrine of laches to defeat the Tribes' claim to shellfish. The doctrine of laches is defined as "neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to [the] adverse party, operates as [a] bar in [a] court of equity." Black's Law Dictionary 875 (6th ed.1990). In urging us to apply laches, the Growers argue that "this is an extraordinary case.... These extraordinary facts call for new law." Growers' Opening Brief at 44.

The Growers ask for new law simply because current law precludes their argument. In *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir.1983), we held that "laches or estoppel is not available to defeat Indian treaty rights." Although the equities do weigh heavily in favor of the Growers' argument—the Tribes waited 135 years to assert their shellfishing rights—the law does not support their claim. *See Board of County Comm'rs v. United States*, 308 U.S. 343, 350-51, 60 S.Ct. 285, 84 L.Ed. 313 (1939) (defenses based on delay in bringing claims such as laches and estoppel are inapplicable to claims to enforce Indian rights). Once again, we reiterate that we are interpreting a treaty, and that treaties enjoy a unique position in our law.

UPOW's argument that the Tribes' treaty rights were extinguished by the Indian Claims Commission Act, 25 U.S.C. § 70 (repealed 1978), is without merit. Judge Boldt rejected this theory over twenty years ago, see *United States v. Washington*, 459 F.Supp. 1020, 1039-42 (W.D. Wash.1978), and we reject it here for the same reasons.

D. THE DISTRICT COURT ABUSED ITS DISCRETION IN LIMITING THE TRIBES' RIGHT TO HARVEST SHELLFISH FROM CERTAIN AREAS BECAUSE THE DISTRICT COURT'S ORDER REDEFINED THE TERMS OF THE TREATY.

In their cross-appeal, the Tribes and the United States contend that, in its implementation decision (*Shellfish II*), the district court disregarded its own admonition in its first decision that it lacked authority to rewrite or interpret the terms of the treaties to avoid hardship to any party based on its own notions of the equities. The implementation decision, the Tribes contend, erroneously redefined the terms of the treaties in abrogation of the Tribes' right to take shellfish. For example, the district court refined its definition of the word "cultivated" in the Proviso and imposed "time, place, and manner" restrictions on the Tribes' ability to harvest shellfish.

We hold that the district court impermissibly employed equitable powers to rewrite the Treaties' terms. However, we also hold that allocating fifty percent of the commercial Growers' shellfish harvest to the Tribes would unjustly enrich them. Such an allocation would simply not comport with *Fishing Vessel*'s concept of giving the Tribes a "fair share" of the harvest.

1. The district court improperly limited the Tribes' right to take shellfish from the Growers' shellfish beds.

In *Shellfish II*, the district court declared that "it is incumbent upon this Court to use its equitable powers to effect a balance between the Tribes' Treaty shellfishing right and the Growers' and Owners' interest in the peaceful enjoyment and/or commercial development of their property." *Id.* Using these "equitable powers," the district court formulated a "broader" definition of a "cultivated" shellfish bed that applies only to "the existing beds on property owned or leased by Growers licensed by the State of Washington." *Id.* at 1461. The court then deemed

natural shellfish beds that have been enhanced by human means "de facto artificial beds" upon which the Tribes may not take shellfish.[8] *Id.* at 1462. "Permitting the Tribes to harvest fifty percent of the shellfish from de facto artificial beds would confer a windfall on the Tribes, and would neither protect nor encourage the growth of the shellfish industry." Id.

In support of its use of equitable principles, the district court and Appellants primarily rely on five cases: *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, 357, 47 S.Ct. 142, 71 L.Ed. 294 (1926) (awarding Indians monetary payment rather than ejecting "innumerable innocent purchasers" from tribal land); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 519 n.5, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986) (Blackmun, J., dissenting) (citing *Yankton* and acknowledging that equitable considerations might have limited the remedies available had the plaintiff tribe prevailed on its claim to 144,000 acres of land); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 260, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (Stevens, J., dissenting) (urging that laches be applied to bar Indians' claim to lands); *Brooks v. Nez Perce County, Idaho*, 670 F.2d 835 (9th Cir.1982) (in an action to quiet title to a parcel of land, equitable considerations would not bar the claim to the land entirely, but "[l]ack of diligence by the government in exercising its role as trustee may be weighed by the district court in calculating damages" for several decades of loss of use of the land); *United States v. Imperial Irrigation Dist.*, 799 F.Supp. 1052 (S.D.Cal.1992) (employing tort-law equitable principles to award monetary damages to the plaintiff Indians, rather than restoring tribal land to them).

None of the above cases, however, involve the use of equitable considerations in interpreting Indian treaties. At best, they condone the use of equity as a tool to calculate damages. The majority in *Oneida*, 470 U.S. at 244, stated that "it is far from

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[8] The court declared that only "those beds whose existence is entirely due to the natural propagation of the species" are subject to the Tribes' Treaty rights. This declaration excluded from Tribal harvest: 1) beds created from scratch; 2) beds enhanced by planting, netting or seeding pre existing shellfish beds; 3) beds enhanced by using predator control or rototilling in or around preexisting beds; and 4) "beds whose existence is due to the Grower's efforts, albeit passively, such as the 'natural' migration of shellfish from an artificial bed to a new spot." *Shellfish II*, 898 F.Supp. at 1462.

clear that [laches] is available in suits such as this one" to restore Indian lands to Indians pursuant to treaty rights. In fact, in the terse three-page *Brooks* opinion, the court concluded that laches was not a valid bar to the Indians fifty-four-year-old complaint for a parcel of land. 670 F.2d at 837. *Brooks* had nothing to do with interpretation of an Indian treaty, but merely concluded that the lengthy delay in pursuing the action could be used in "calculating damages." Here, by contrast, the district court is using equitable principles to assist in fashioning the remedy and in interpreting the Treaty.[9]

The Tribes, on the other hand, cite persuasive and unambiguous Supreme Court authority. The district court's re-interpretation violates the Supreme Court's admonition in *United States v. Choctaw Nation*, 179 U.S. 494, 532-33, 21 S.Ct. 149, 45 L.Ed. 291 (1900), a seminal Indian treaty interpretation case:

> But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words.... We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice.

(emphasis added; quotation and citation omitted). The district court itself recognized in *Shellfish I*:

> In reaching its decision, the Court may not rewrite the Treaties or interpret the Treaties in a way contrary to settled law simply to avoid or minimize any hardship to the public or to the intervenors. Indeed, the Court has no such power. Rather, amelioration from such hardships should be sought from Congress, which has the power to abrogate the treaty....

873 F.Supp. at 1429. *See also Choctaw*, 179 U.S. at 531-32 (citing cases in support of rule that "the language used in treaties with the

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[9] The Imperial Irrigation District case provides little support for the Appellants. First, it is currently pending on appeal. Second, it is stayed pending settlement discussions. *See* 799 F.Supp. at 1068.

Indians should never be construed to their prejudice" and that words should be construed as they "were understood by this unlettered people, rather than their critical meaning"). Under these rules of construction, the *Choctaw* precedent, and the district court's own statements in *Shellfish I*, the district court abused its discretion by applying notions of equity to redefine the term "cultivate."

It does not follow from the above, however, that the district court is without the ability to use equity in implementing its Treaty interpretation. As laid out below, we believe the district court should have used its equitable powers only to limit the take of the Tribes—not the location—so as to avoid any unjust enrichment.

2. The district court improperly allocated to the Tribes a fifty-percent share of shellfish from the Growers' beds.

Appellants contend that Tribes' allocation of fifty-percent of the shellfish resource exceeded their "fair share." Appellants suggest that the district court should have considered "equitable factors" and that it improperly applied the "moderate living" analysis suggested by the Supreme Court in *Fishing Vessel*, 443 U.S. at 684-686. Although we conclude that the district court correctly applied *Fishing Vessel* 's moderate living analysis, we hold that the district court should have used equitable principles to limit the Tribe's shellfish harvest from the Growers' beds to a "fair share."

In *Fishing Vessel*, the Court stated that an equitable measure of the common right should initially divide the harvestable portion of each run that passes through a "usual and accustomed" place into approximately equal treaty and non- treaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount. 443 U.S. at 685. The Court elaborated on this concept:

> [T]he central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than is necessary to provide the Indians with a livelihood-that is to say, a moderate living.... If, for example, a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries, a 45% or 50% allocation of an entire run that passes through its customary fishing grounds would be manifestly inappropriate because the livelihood of the tribe under

> those circumstances could not reasonably require an allotment of a large number of fish.

Id. at 686-87. Appellants contend that the district court's allocation of fifty percent of the shellfish resource goes beyond what is necessary to afford the Tribes a "moderate living."

The district court, however, heard evidence as to the Tribes' living standards presented by both sides and concluded that Appellants' experts' analyses were "flawed."[10] The district court made the following finding:

> The uncontroverted evidence presented at trial is that the Tribes lag significantly behind other residents of the State of Washington in their overall standard of living. For example, approximately one in three Tribal members live below the poverty level; Indians in the State of Washington endure health circumstances characterized by the State as "very poor;" tribal members have per capita incomes that are less than one half the per capita income of non-tribal residents of the State; and tribal members suffer from unemployment rates at least three times greater than that of all non-tribal residents of the State of Washington.

Shellfish I, 873 F.Supp. at 1446. This finding is not clearly erroneous.[11]

However, *Fishing Vessel* instructs us to give the Tribes a "fair share" and to "fairly apportion" the fish. *Fishing Vessel*, 443 U.S. at 682, 686. With respect to the Growers' shellfish beds, we conclude that it would contravene such notions of fairness if the Tribes were permitted to take fifty percent of the Growers' enhanced harvest. Many of the Growers have spent decades developing and

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10 UPOW's expert, Dr. Thomas, relied solely on what he called "tribal household income" and compared it to a moderate living standard by reference to the Bureau of the Census income data for non-Indian households. 873 F.Supp. at 1446. The district court concluded that this analysis was flawed because it relied only on income, making it a "single-indicator" analysis. *Id.*

11 Even if we were to consider Tribal income from casino operations—as the Appellants ask us to do—we would not be left with a "definite and firm conviction" that the district court's findings were erroneous.

enhancing production on their shellfish beds, investing their valuable time, energy, and considerable resources. We therefore hold that only those Growers' beds that exist solely by virtue of the natural propagation of the species are subject to a full fifty-percent harvest allocation. The other Grower beds will be subject to the allocation analysis below.

Our decision here is consistent with our previous decision in *United States v. Washington*, 759 F.2d 1353, 1358-59 (9th Cir.1985) (en banc), where we concluded that hatchery fish are subject to Treaty allocation. In that decision, several "equitable considerations" favored the Tribes' position, including "the lack of State ownership of the fish once released" and "the lack of any unjust enrichment of the Tribes." *Id.* Here, however, those same equitable considerations do not support the Tribes' allocation of fifty percent of the Growers' shellfish. First, unlike hatchery fish—which are replacement fish that are released into the water when grown—shellfish on the Growers' beds remain on the Growers' beds until they are harvested. Second, in the instant case, the Tribes would be unjustly enriched if they were entitled to a full fifty percent of the Growers' shellfish. The Tribes candidly admitted as much at oral argument when they conceded that equity should permit a Grower to protect his enhanced harvest "for a couple of years." We believe not for a couple of years, but forever.

Our conclusion squares with one of the purposes of the Proviso, which was "to protect the fledgling oyster industry['s]" efforts to create a harvest where there was none, or where it was insufficient to support a commercial livelihood. *Shellfish I*, 873 F.Supp. at 1437-38; *see also id.* ("To the extent [the Proviso] prohibited Indians from taking shellfish from both artificial and natural shellfish beds where settlers were engaging in fruitful harvesting, [the Proviso] would aid the development of the industry."). Moreover, the Tribes are not excluded from their ancient fisheries; they are merely precluded from taking an unfair share.

We therefore apply the following analysis to Grower beds where the Growers, or their predecessors, began their enhancement efforts on a natural bed. For such natural beds, the Growers shall demonstrate what portion of their harvest is due to their labor, as opposed to what portion would exist absent the Growers' enhancement. *See Shellfish II.*,,.898 F.Supp. at 1462. For such enhanced natural beds, the Tribes shall be entitled to fifty percent of the pre-enhanced sustainable shellfish production from those

beds.[12] Of course, this allocation analysis does not apply to artificial beds, that is, to Grower beds that did not support a sustainable commercial density of shellfish prior to cultivation. As the Tribes have acknowledged, the Tribes have no right to harvest such beds. 898 F.Supp. at 1460-61.[12]

We place the burden of proving pre-enhancement harvest versus post-enhancement harvest on the Growers—for the Growers are best able to prove such a calculation.[13] We remand to the district court for a determination as to the best manner to implement this allocation. We emphasize that this "enhanced allocation" analysis applies only to the Commercial Shellfish Growers' beds.

3. The district court erred by concluding that the State of Washington is a "citizen."

The district court determined that the term "citizens" in the Shellfish Proviso, "includes the State of Washington, when the State acts on behalf of the public." *Id.* at 1459-60. The court noted that "the five million residents of the State are blameless in this controversy, and the Court believes that the benefits and efficiencies of permitting the State to act on their behalf in growing the State's shellfish resource far outweigh any interest the tribes have in limiting the artificial bed exclusion to natural persons." *Id.* n. 11. The court therefore concluded that "to the extent the State hereafter creates artificial shellfish beds on public property, those beds shall be deemed 'staked or cultivated by citizens' and thus excluded under the Shellfish Proviso from the Tribes' Treaty right." *Id.* Because the court once again improperly invoked equitable principles in its interpretation of the Treaty, and there is no support in the law for the proposition that a state can be a "citizen," we reverse this aspect of the district court's decision.

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12 For example, if ten clams per square foot were a density sufficient to support a commercial livelihood at the time that enhancement began, and if a 100 square foot Grower's bed yielded ten clams per square foot prior to the Grower's efforts to enhance the output (1,000 clams), and that same bed now produces fifty clams per square foot as a result of the Grower's labor (5,000 clams), the Tribes would be entitled to fifty percent of the 1,000 clams or 500 clams.

13 One way to do this would be to compare a Grower's bed's earliest shellfish production figures with the bed's current output. This could serve as one of the bases by which to calculate the proper allocation amount.

In the State of Washington's brief and at oral argument, it was unable to cite a single case to support its proposition that a State can be "citizen." We note that it took an act of Congress to enable a corporation to be considered a citizen for purposes of diversity jurisdiction. *See* 28 U.S.C. § 1332. We therefore reverse that portion of the district court's decision which deems the State of Washington a "citizen" for purposes of the Shellfish Proviso.

4. The district court committed clear error in finding that 0.5 pounds of mature clams per square foot is the minimum density necessary to establish a natural bed.

In *Shellfish II*, the district court concluded that "in light of the practices and understandings in the shellfish industry that existed at treaty time, it is clear that a quantitative definition of a natural bed is appropriate." 898 F.Supp. at 1461. The court defined a "natural shellfish bed" as a "bed capable of sustaining a yield of shellfish that will support a commercial livelihood." *Id.* The Tribes do not dispute these findings, but contend that the district court committed clear error when it found that the minimum quantity of manila clams that will support a commercial livelihood is 0.5 pounds of mature clams per square foot. Manila clams are the only species for which the district court made such a finding. Because there is insufficient evidence in the record to support the district court's finding, we conclude that the district court clearly erred.[14]

No witness gave an opinion as to the density of manila clams necessary for a successful commercial harvest. No document in the record sets forth any analysis of what density is necessary for commercial success. There is a document in the record which purports to show the densities of twelve manila clam beds leased from the State of Washington, but twelve beds is far too small and unrepresentative a sample of commercial beds to support a reliable finding of fact. *See, e.g., National Lime Ass'n v. EPA*, 627 F.2d 416, 434 n. 52 (D.C.Cir.1980) (recognizing problems with generalizing "from an extremely limited sample when a broader sample ... can be readily obtained and when no showing of the representativeness of the sample is made") (citations omitted). Moreover, there is no

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[14] Because we conclude that the district court clearly erred, we do not address the Tribes' contention that they were unfairly surprised and unable to present evidence on this issue. On remand, the Tribes will have an opportunity to present such evidence.

indication that these bed samples included only mature clams in their density calculation. Significantly, two of the twelve beds appear to have densities of less than .26 pounds per square foot.

In light of the above, we reverse the district court's finding that the minimum quantity of manila clams that will support a commercial livelihood is 0.5 pounds of mature clams per square foot. We remand to the district court for a new hearing on this issue.

5. The district court did not abuse its discretion by limiting the Tribes' ability to cross private uplands.

The district court prohibited tribal access across privately owned upland property to reach shellfishing areas unless "specifically requested from and granted by a Special Master," with permission to be refused unless "tribal members can demonstrate the absence of access by boat, public road, or public right of way."[15] *Shellfish III*, 909 F.Supp. at 793. The Tribes contend that this decision is "an unprecedented limitation on Tribes' treaty fishing rights."

The Supreme Court has already determined that the Tribes are entitled to a right of access across private lands to invoke their Treaty fishing rights. *Winans*, 198 U.S. at 383. Winans recognized that the Treaties "imposed a servitude upon every piece of land as though described therein." *Id.* at 381. Rather than completely eliminating the Tribes' rights to cross private land, which it could not do under *Winans*, the district court engaged in a careful balancing of hardships in fashioning its remedy. Although we have held that the district court cannot use equitable principles in interpreting the Treaties, it can use them in deciding how to implement the Treaties (i.e., how the tribes will be allowed to exercise their previously interpreted rights). Such a use of equities is permissible under the circumstances of this case. *See Yankton*, 272 U.S. at 357 (allowing monetary damages to Indians in lieu of ejectment of innocent land purchasers in order to avoid a "great

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15 This decision amended the court's decision in *Shellfish II*, which originally held that the Tribes had no right of private upland access at all. 989 F.Supp. at 1473.

injustice").[16] We therefore conclude that the district court did not err by requiring the Tribes to prove the unavailability of other forms of access before allowing them to cross private land.

6. The district court did not abuse its discretion in imposing time, place, and manner restrictions on the Tribes' ability to harvest shellfish.

The district court also invoked equitable principles to subject the Tribes' Treaty shellfishing right to reasonable time, place and manner restrictions when the right is exercised on the Growers' or Owners' property. As discussed directly above, the time, place, and manner restrictions present a proper use of the court's equitable powers.

The court imposed the following restrictions on the Tribes' ability to harvest shellfish: 1) the Tribes' harvest is limited to five days per year, with some increase on larger lots, for any private beach not controlled by a Grower, 898 F.Supp. at 1473; 2) if a Grower decides that a Tribe's proposed harvest plan is not "compatible with the Growers' farming operation," the Grower may unilaterally modify the plan, and have "the final word on how a tribal harvest will be conducted," *id.* at 1470; 3) the Grower may entirely prohibit harvest of natural clams underneath areas cultivated for oysters, even when no oysters are then present, *id.* at 1471; 4) no harvest may occur on non-Grower private tidelands without a survey "to determine the existence of shellfish populations," *id.* at 1472; and 5) the "manner and method" of such a survey must be "of the type currently in use by the State." *Id.*

Of particular concern to the Tribes is the restriction that allows the Growers to control access to natural clams by choosing not to harvest them in favor of the oysters under which the clams are found. The Tribes describe this restriction as a "gaping loophole" that has the capacity at the Growers' discretion to deny to them the very rights to natural clams which our holding confirms.

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[16] The Tribes and the United States also urge us to read into the absence of upland access showing a "reasonableness" requirement. We decline to do so, but we direct the district court, upon remand, to clarify its order with regard to this issue.

The Growers' counter with the argument from the record that the process of harvesting natural clams from underneath the oyster beds can seriously disrupt and suffocate their oysters.

On reflection, the Tribes' concerns although certainly not fanciful-are based at this point on speculation as to what might happen in the future. The Growers, for example, represent that "where there are substantial economic benefits to a Grower from harvesting clams, the Grower will do so." And, "[a]s soon as the Grower does, the trial court's implementation plan provides that the Tribes have the right to a share of those clams." The Growers say that they are "commercial farmers-if there is money to be made, the resource assuredly will be exploited."

Under the circumstances, we believe that the district court's restrictions do not amount at this time to an abuse of discretion. The district court attempted to fashion a prospective solution to a difficult situation by balancing the parties' respective interests. The district court's restrictions safeguard the Tribes' right of access to the ancient fisheries, but also protect the interests of the Growers and Private Owners. Importantly, in this aspect of the court's decision the court did not use equity as the basis for its interpretation of the decision, but only as a way to implement its correctly reasoned interpretation of the Proviso. While the Tribes may not be happy with the limits imposed on their harvesting, they are still able to effectuate their allocation under the Treaties and are not excluded from their ancient fisheries.

We are confident that any future practices by the Growers that trench inappropriately upon the Tribes' rights as confirmed in this opinion will be adequately dealt with by the district court. The district court is the best place to manage any wrinkles that might crop up. The best way to avoid such problems, of course, is for the parties constructively to work together to respect each others' rights.

We reject the Tribes' contention that the restrictions are contrary to the Supreme Court's decision in *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968). *Puyallup* arose because a series of Washington state court decisions and state regulations imposed discriminatory restrictions on the Tribes. The Supreme Court held "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Id.* at 398 (emphasis added). The

Tribes cite no persuasive authority, however, to support the application of these standards to an implementation order promulgated by a Federal District Court. *Puyallup* applies to restrictions imposed "by the State," not the Federal Courts. The district court drafted the implementation order to interpret and to enforce the Tribes' rights under the Treaties, not to restrict those rights. The motivation underlying the Court's decision in *Puyallup*—state discrimination against tribal fisheries—is simply not a factor when a district court imposes equitable restrictions of the type present in this case.

7. The district court's procedures for selecting and disqualifying special masters deny due process.

Shellfish III established a panel of four special masters, with one to be randomly selected to hear each dispute. 909 F.Supp. at 793. The Tribes object to two aspects of the plan: 1) Appellants' right to designate three of the four panel members; and 2) the designating parties' ability to remove special masters at will and without court approval. The district court rejected the first objection outright, noting that the two parties to a dispute each have a twenty-five percent chance of having their own special master selected. The Tribes contend that Appellants have almost identical interests: therefore, the odds are 3-1 in Appellants' favor. In fact, the district court made a finding that "each of the other parties is adverse to the Tribes, but not necessarily aligned with the others." *Shellfish III*, 909 F.Supp. at 790. Given the district court's finding that the Appellants are "adverse to the Tribes," we conclude that due process is violated if there is a seventy-five percent chance that Appellants' master will be selected. We therefore vacate this aspect of the implementation plan, and remand to the district court to reconfigure the appointment of Special Masters.

The Tribes also argue that allowing the parties to appoint and remove the master at will compromises the independence of the special master. Because the district court must approve the appointment of the Masters, see *Shellfish III*, 909 F.Supp. at 794, we find no merit in this argument.

8. The district court did not err in authorizing a special master to award damages against Tribal members.

The Tribes argue that *Shellfish III*'s provision allowing the special master to award damages against Tribal members is legally flawed. In addition, they contend that *Shellfish II* erroneously

contains a provision allowing damages against the Tribes themselves. In *Shellfish III*, the district court amended its decision to preclude damage awards against the Tribes because Tribes cannot be sued without their unequivocal consent. *See Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). The district court, and the Tribes in their motion for reconsideration, apparently overlooked section 6.2 of *Shellfish II*'s implementation order. Section 6.2 also allows special masters to award damages against the Tribes. We therefore vacate the portion of section 6.2 that allows for a special master to award damages against the Tribes. As set forth below, however, the special master can award damages against individual Tribal members.

The Tribes concede that individuals may be bound by orders affecting their "common public rights as citizens" in litigation to which their sovereign is a party. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 341, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958). A similar issue arose in *Fishing Vessel*, 443 U.S. at 692 n. 32, where the Court concluded that non-party fishermen could be enjoined from actions interfering with the judgment of the district court. "[A] court clearly may order them to obey that judgment." *Id.* The Tribes' assertion that "the contemplated claims against tribal members have nothing to do with the common rights of state or tribal citizens" therefore is without merit. On the contrary, if tribal members damage private property while exercising their fishing rights, they directly implicate their sovereigns' interests and the district court's judgment.

Similarly, the Tribes' argument that claims for trampled shrubs, damaged docks, or littered beaches "would raise no federal question" is also without merit. If the damages arise out of the exercise of fishing rights based on the district court's interpretation of the Stevens Treaties, the district court has the authority to hear such a dispute. Moreover, the dispute would arise from the same "nucleus of operative facts," affording the court supplemental jurisdiction under 28 U.S.C. § 1367.

We therefore affirm the special master's ability to recommend damages against individual Tribal members, but vacate section 6.2's provision allowing damages against the Tribes.

9. The district court did not err in determining that the Tribes are not entitled to attorney's fees.

The Tribes request attorney's fees under 42 U.S.C. § 1988. The Tribes' request is foreclosed by *United States v. Washington*, 813 F.2d 1020 (9th Cir.1987) (concluding Tribes not entitled to attorney's fees in entire *United States v. Washington* series of litigation). We therefore affirm the district court's denial of fees.

VII. CONCLUSION

For the reasons discussed above, we AFFIRM IN PART and REVERSE IN PART the district court's decisions in *Shellfish I*, *Shellfish II*, and *Shellfish III*. We REMAND this case to the district court for proceedings consistent with this opinion. In so doing, we compliment the district court for the clarity of its opinions previously rendered.

We recognize the enormous impact our decision will have on the thousands of homeowners, Tribal members, and commercial fishermen in the Puget Sound region. It must be remembered that we are a court of limited jurisdiction. Moreover, we are bound by the Constitution's Supremacy Clause which accords special standing to treaties. We do not have the power simply to "rewrite the Treaties or interpret the Treaties in a way contrary to settled law simply to avoid or minimize any hardship" to any of the parties in this case. *Shellfish I*, 873 F.Supp. at 1429. This case has come a long way since the 1970's when a "total lack of meaningful communication" led to "deep distrust" between the parties. 384 F.Supp. at 329-30. The parties have apparently made sincere efforts to settle this dispute; we hope that our decision assists and renews that effort.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

The parties shall bear their own costs of this appeal.

BEEZER, Circuit Judge, Concurring:

I specially concur in the opinion of the court. I express my views concerning the interpretation of the Stevens Treaties and the appointment of special masters.

The Stevens Treaties provide:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens.

Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132, Art. III (it is undisputed that this clause is substantively identical in all subject treaties).

The United States asks us to hold that shellfish beds, unharvested in the nineteenth century, were "usual and accustomed" tribal fishing grounds in 1854. This argument strains even the deferential canons of Indian treaty interpretation. It is, however, the law of this case and of the Supreme Court that the reserved fishing right makes no distinctions between migratory fish and shellfish or between fish runs and static fishing grounds. The origin of this rule of law is perplexing.

In 1974, Judge Boldt concluded that the Indian Tribes had treaty fishing rights which entitled them to harvest up to fifty percent of fish passing through the tribes' fishing grounds. United States v. Washington, 384 F.Supp. 312 (W.D.Wash.1974) ("Boldt Decision"), aff'd, 520 F.2d 676 (9th Cir.1975), cert. denied, 423 U.S. 1086 (1976). The Supreme Court "substantially upheld" the Boldt Decision in Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1978). United States v. Suquamish Indian Tribe, 901 F.2d 772, 773 (9th Cir.1990). The Boldt Decision held that the fishing right is "not limited as to species of fish." Boldt Decision, 384 F.Supp. at 401.

Fishing Vessel held that tribes have a right to equal amounts of fish "taken from runs of fish that pass through the Indians' usual and accustomed fishing grounds." Fishing Vessel, 443 U.S. at 689. A tribe's rights are defined in case law by the grounds the tribe fished and not the particular species taken. The Indians reserved the "right to take a share of each run of fish that passes through tribal fishing areas." Id. at 679. Implicit in the Fishing Vessel opinion is the principle that to limit access strictly to historical fishing grounds and species would render the right to fish a nullity because citizens

could harvest all fish downstream. Similarly, in United States v. Winans, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905), the Court determined that the issuance of a license to erect a fishing wheel where the device deprived Indians of the run of fish that passed through their usual and accustomed fishing grounds was impermissible.

The underpinning of the Court's interpretation of the Stevens Treaties should not apply to shellfish because they are, with the exception of crustaceans, immobile. There can be no device that prevents the migration of immobile shellfish to, through or from the tribes' usual and accustomed fishing grounds.

The burden imposed by our opinion cannot be overstated. The record in this case makes abundantly clear that since treaty times a vibrant shellfish industry has developed in the State of Washington along the saltwater beaches of the Pacific Ocean and along tidelands adjoining the inland waters of Puget Sound.

The labors of a modern day shellfish producer are vividly recounted in The Seattle Times, May 1, 1997, p. B-1, as follows:

> After all, one of the first skills he found necessary was the patience to stare for 10 hours at a time at a leathery, slithering geoduck neck sticking out of a plastic bucket full of sand--waiting to catch the unlovely bivalve in its private, and very erratic, act of spawning. Complicating the task is the fact that geoducks must spawn before hatchery breeders, such as Dahman, can tell the males from the females.
>
> "It's maddening stuff. These geoducks can make a long day of it for you," says Dahman. His tattered logger's clothing and irreverent rants about biologists and bureaucrats belie the mix of genetics, mechanical engineering, global marketing and money going into this venture.
>
> "The idea here is to grow geoducks where we've never been able to grow anything before. We're still crawling at all this."
>
> For Dahman, the first baby steps will come this fall when he harvests the initial crop of hatchery-reared geoducks planted on his south Puget Sound tidelands outside of Shelton four years ago.

> Dahman Shellfish and its neighbor, Taylor United, one of the state's biggest shellfish growers, are believed to be the first in the U.S. commercially raising geoducks--a forerunner, predict aquaculture experts, to eventually breeding such edible if weird-looking creatures as sea cucumbers and sea urchins in the lab.

Citizens--as well as tribal members and the state--have long set aside suitable tidelands acquired by purchase, by inclusion in reservation boundaries or by dedications adjoining state lands to the cultivation of clams, oysters and other species of shellfish. The opinion we file today will open these tidelands to the harvest of commercially valuable shellfish by the Tribes in common with the citizens as a matter of treaty right.

It is now clear that the Tribes are granted access to tidelands which contain cultivated shellfish produced by the Growers. The details of how much and when the Tribes may harvest shellfish from such lands remains unresolved. We assign the Growers "the burden of proving pre-enhancement harvest versus post- enhancement harvest." The district court will be faced with the application of this scheme. Our suggestion shifts the law that the party asserting a treaty right must prove that right. See, e.g., United States v. Lummi Indian Tribe, 841 F.2d 317, 318 (9th Cir.1988) (a tribe asserting usual and accustomed fishing grounds has the burden to produce evidence that a particular location was customarily used at treaty time). The assignment of the burden of proof is critical. The district court, after hearing testimony, determined that it "would be very difficult--if not impossible--to develop a 'snapshot' of existing shellfish beds at the time commercial development commenced on the Growers' property." Shellfish II, 898 F.Supp. at 1462. Where a disputed fact cannot be proven, the placement of the burden of proof is dispositive. The Growers' burden is heavy and the district court's assignment is daunting.

The tension between grower and Indian under treaty provisions is clear. One will not grow shellfish on lands bearing natural shellfish to provide subsistence to the other without compensation for the damage occurring to the cultivated shellfish. The majority asks the parties to "constructively ... work together to respect each others' rights." I fear the time for that has passed. The fact that the Tribes are concerned about the Growers' "gaping loophole" to deny them access to naturally occurring shellfish by never allowing their beds to be free of oyster crops evidences the tension between the parties. Burden of proof and access issues that

remain unresolved in the opinion we file today guarantee continuing disputes between the tribes and the citizens of Washington State.

Property rights, which have been undisturbed for generations, are encumbered by our decision today. In Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dal.) 304, 310, 1 L.Ed. 391 (Cir.Ct.Pa.Dist.1795), Justice Patterson observed:

> From these passages it is evident; that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law.

Property rights, so fundamental to American government, need not be trampled upon. Exclusive use of private tidelands by commercial growers should not deprive the Tribes of their treaty share of shellfish; the Tribes could be allocated half of the naturally occurring shellfish without disturbing the hard-earned and long-held property rights of private growers. Shares of the shellfish taken, of course, need not be determined by the place where the shellfish are taken.[1] Thus, a tribal share of shellfish could come from reservation land, government land or private tidelands acquired by the tribe.

Survival of Washington's shellfish industry depends upon the growers' ability to dedicate tidelands to exclusive use. This cannot be done under existing case law interpretation of the Stevens Treaties. We are, however, bound, by the authority of the Supreme Court and the law of the case, to that interpretation. Exclusive use of tidelands will be possible if the Supreme Court recognizes the shellfish proviso with respect to "cultivation" and makes clear the distinctions between migratory fish and shellfish; between fish runs and static fishing grounds; and between natural shellfish and cultivated shellfish.

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[1] Fishing Vessel makes this point clear. The Court held that "fish taken by treaty fisherman off the reservations and at locations other than 'usual and accustomed' sites ... [are] to be counted as part of the Indians' [treaty] share." Fishing Vessel, 443 U.S. at 687 n. 29.

II

The district court held that, upon proper showing and subject to time, place and manner restrictions, the Tribes are entitled to cross private property in order to exercise their shellfishing rights. United States v. Washington, 909 F.Supp. 787, 792 (W.D.Wash.1995). If a dispute arises between a property owner and a Treaty Tribe, concerning the exercise of the Shellfish Treaty right, the matter is to be resolved by a special master. Id. The Tribes, the State of Washington, the Shellfish Growers and the Private Property Owners each are permitted to designate a special master, one of which is to be selected at random to resolve a pending dispute. Id. at 793-94. The special master is to issue a written report and recommendation subject to approval and adoption by the district court. Id. at 794. The opinion filed today holds that "due process is violated" because "there is a seventy-five percent chance that Appellants' master will be selected." We vacate and remand to the district court to reconfigure the appointment of special masters.

Fed.R.Civ.P. 53(a), which governs the appointment of special masters, states in pertinent part, "[t]he court in which any action is pending may appoint a special master therein." Reference to a master "shall be the exception and not the rule" and shall be made "upon a showing that some exceptional condition requires it." Burlington Northern v. Dep't of Revenue, 934 F.2d 1064, 1071 (9th Cir.1991) (quoting Fed.R.Civ.P. 53(b)). "The use of masters is 'to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause,' and not to displace the court." La Buy v. Howes Leather Co., 352 U.S. 249, 256, 77 S.Ct. 309, 1 L.Ed.2d 290 (1956) (quoting Ex Parte Peterson, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920)). "Litigants are entitled to a trial by the court, in every suit, save where exceptional circumstances are shown." Id. at 258. "Congestion in itself is not such an exceptional circumstance as to warrant a reference to a master." Id. at 259; see also Wright & Miller, Federal Practice and Procedure: Civil 2d § 2601 (1995) (the appointment of a master is for the purpose of assisting the court to obtain facts). "The Courts have tended to read Rule 53 narrowly, closely circumscribing the range of circumstances in which reference to a master is appropriate." Burlington Northern, 934 F.2d 1071 (quoting In re Armco, 770 F.2d 103, 105 (8th Cir.1985)).

Referral to a special master is reviewed for an abuse of discretion. Burlington Northern, 934 F.2d at 1071 (citing United States v. Suquamish Indian Tribe, 901 F.2d 772, 774 (9th

Cir.1990)). We have affirmed the use of special masters repeatedly in the Stevens Treaty cases. See, e.g., Suquamish Indian Tribe, 901 F.2d at 775 (noting that we could "not think of a more comprehensive and complex case than" the Boldt decision and its successors); see also United States v. Washington, 730 F.2d 1314 (9th Cir.1984). In the present matter, however, the district court made no finding that disputes regarding whether tribes must pass over private land to harvest shellfish is complex or extraordinary. Indeed, disputes are likely to present straightforward trespass and property questions. Because the district court did not make a finding of complexity or exceptional circumstance as required under Rule 53, referral to a special master is not yet appropriate.

Neutrality of the special master is also a paramount concern. In the Stevens Treaty cases, prior referrals have been to a magistrate judge, not a master selected by the parties. See, e.g., United States v. Washington, 626 F.Supp. 1401 (W.D.Wash.1985). The Supreme Court has long held that "due process implies a tribunal both impartial and mentally competent to afford a hearing." Jordan v. Massachusetts, 225 U.S. 167, 176, 32 S.Ct. 651, 56 L.Ed. 1038 (1912); see also Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."). The neutrality requirement helps guarantee that life, liberty or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law and preserves the appearance and reality of fairness. Marshall, 446 U.S. at 242. A party may establish that he has been denied his constitutional right to a fair hearing before an impartial tribunal by a showing of actual bias or the adjudicator's pecuniary or personal interest in the outcome. Stivers v. Pierce, 71 F.3d 732 (9th Cir.1995). In addition to the constraints of due process, Canon 1 of the Code of Conduct for United States Judges sets the integrity and independence of the judiciary as an indispensable goal. Administrative Office of U.S. Courts, Code of Judicial Conduct for United States Judges (1997).

The masters here are selected by the parties, presumably because the candidates are likely to rule favorably. Whether each side is permitted to designate one or many potential candidates, the result is a master that is chosen because of a real or perceived bias. Even if the district court ultimately approves the selection of the master and adopts the master's report and recommendation, that does not cure the error. A property owner subject to an unforeseen access easement or a tribe denied access to a harvest will find little solace in the judge's signature adopting the special master's findings.

I would hold that the special master selection process adopted by the district court violates due process. I would remand to the district court to make findings supporting the necessity for a master; to appoint an independent special master and to give special consideration to the appointment of a magistrate judge.

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873 F. Supp. 1422

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, et al.,	)	
	)	No. CV 9213
	)	
Plaintiffs,	)	Sub-proceeding
v.	)	NO. 8903
	)	
STATE OF WASHINGTON, et al.,	)	MEMORANDUM
	)	OPINION
Defendants.	)	AND ORDER
	)	

December 20, 1994

MEMORANDUM OPINION AND ORDER

RAFEEDIE, District Judge

I. INTRODUCTION

A. History of the Case

This sub-proceeding, filed by the United States and 16 Indian Tribes,[1] involves the Stevens Treaties[2] which were interpreted in *United States v. State of Washington*, 384 F.Supp.

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[1] The Tribes active in this sub-proceeding are the following: the Tulalip, Puyallup, Squaxin Island, Makah, Muckleshoot, Upper Skagit, Nooksack, Nisqually, Lummi, Skokomish, Port Gamble S'Klallam, Lower Elwha S'Klallam, Jamestown S'Klallam, Suquamish, Yakama, and the Swinomish (*hereinafter* "The Tribes"). The Quinault, Quileute, and Hoh Tribes, all coastal Tribes, made appearances in the action; however, they were not active participants, and they sought no relief.

[2] The treaties are called the "Stevens Treaties" because of the participation in the negotiations of all of the treaties by Territorial Governor Isaac Stevens. Each of the Tribes involved in this sub-proceeding are the successors in interest to one or more of the following treaties: Treaty of Medicine Creek, December 26, 1854 (10 Stat. 1132); Treaty of Point Elliott, January 26, 1855, (12 Stat. 927); Treaty of Point No Point, January 26, 1855 (12 Stat. 933); Treaty with the Makah, January 31, 1855 (12 Stat. 939). *Hereinafter* "The Treaties."

312 (W.D. Wash. 1974) (*hereinafter Washington I*); *aff'd*, 573 F.2d 1123 (1978) (*hereinafter Washington II*); *aff'd in substantial part*, 443 U.S. 658 (1979). The parties filed this action seeking a declaration of the nature and extent of tribal off-reservation shellfishing rights, an the extent to which such rights may be affected by the following limiting provision ("the Shellfish Proviso"): "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory . . . *Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens*."[3]

Washington I was decided in 1974. At that time, the Court reserved jurisdiction to hear other unresolved issues arising out of the Stevens Treaties. In *Washington I*, the issue before the Court was the nature and extent of the treaty Tribes' off-reservation fishing rights with respect to anadromous fish. That decision established the locations of the Tribes' usual and accustomed grounds and stations and found that the Tribes were entitled to take 50% of the harvestable fish from those grounds and stations. Subsequently, the Supreme Court substantially affirmed the decision finding that the trial court had correctly adjudicated the nature and extent of the Tribes' fishing rights. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (*hereinafter Fishing Vessel*).

Thus, the treaty Tribes' rights with respect to anadromous fish in the Puget Sound are is the law of the land. Finally, on September 2, 1993, consistent with *Washington I* and *Fishing Vessel*, this Court ruled that "shellfish" are "fish," within the meaning of the Treaties. Thus, the treaty Tribes' right to take shellfish is limited, if at all, only by the Shellfish Proviso in the Treaties or to the extent that the Court finds the Moderate Living Doctrine to be applicable from the evidence and the law.

B. The Parties' Contentions

In this action, the tribal plaintiffs seek the following declaratory relief: (1) that they have the right to take 50% of all of the species of harvestable shellfish that may be safely harvested within their usual and accustomed grounds and stations; (2) that

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[3] This language is taken from the Treaty of Medicine Creek; however, the parties admitted that all of the Stevens Treaties contain substantially similar language.

the usual and accustomed grounds and stations are those previously adjudicated in *Washington I*; (3) that the phrase "staked or cultivated by citizens" in the Shellfish Proviso be interpreted to mean only those non-natural beds that have been staked or cultivated; (4) that the right to take shellfish extends to natural clam beds that exist under the artificial shellfish beds; (5) that the Tribes' authority to regulate the harvest be confirmed; (6) that the Court order co-management of the resource between the Tribe and the State; (7) that the Court enjoin the application and enforcement of specific state statutes which the Tribes claim would be discriminatory in practice; (8) that the Upper Skagit Tribe is the successor to the Nuwha'ha and the Bsigwigwilts and is therefore entitled to take shellfish at the usual and accustomed grounds and stations of the Nuwha'ha and Bsigwigwilts; and (9) that the Yakama Nation has not established any usual and accustomed grounds and stations and thus is not entitled to take shellfish.

Because the Court has found that shellfish are fish, only a limited issue is currently before the Court, namely the effect of the Shellfish Proviso and the nature and scope of the remedy to be granted.

Opposing the plaintiffs are the State of Washington and the intervenors[4] who contend that the "staked or cultivated" provision protects state and private property from shellfishing by the Tribes. Alternatively, but in a similar vein, the intervening shellfish growers argue that the lands which they own or occupy and upon which they conduct the business of shellfish growing have been "staked or cultivated" within the meaning of the Treaties' Shellfish Proviso, hence they conclude that those lands should be exempted from tribal shellfishing under the treaties.

C. Canons of Interpretation

In interpreting the Shellfish Proviso, in general, the Court is bound by both general rules of interpretation, and thespecific rules handed down by the Supreme Court which apply when Indian Tribes assert treaty rights. In particular, the Court must use

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[4] The action was filed originally against the State of Washington. Later in the proceeding the following groups intervened as defendants: the Puget Sound Growers Association; UPOW, the United Property Owners of Washington; and the "Adkins Party," a group of about 20 private property owners. The main representative of the "Adkins Party" are Adkins, Carter, and Alexander.

special canons of construction to determine the meaning of Indian treaties, all of which amount to the same proposition: "[A]mbiguities occurring will be resolved from the standpoint of the Indians." *Winters v. United States*, 207 U.S. 564, 576 (1908). Similarly, treaties with Indians "are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.'" *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1443) (quoting *Tulee v. Washington*, 315 U.S. 681, 684 (1942)).

These canons of construction, however, do not give the court license to interpret a treaty according to the Indians' preferences. The Supreme Court has left no doubt that "even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation*, 318 U.S. at 432. Such an exercise "would be an intrusion upon the domain committed by the Constitution to the political departments of the government." *Choctaw & Chickasaw Nations v. United States*, 179 U.S. 494, 532 (1900).

Finally, in *United States v. Winans*, 198 U.S. 371 (1905), the Supreme Court adopted a "reservation of rights" approach in interpreting treaties with Indian Tribes. In *Winans*, the controversy arose when the settlers, who owned the land fronting the Columbia River, denied Indians access to the river abutting their land and by exercising their rights under state licenses to operate "fish wheels." The fish wheels, as admitted by the parties, gave the landowner "exclusive possession of the fishing places" by obstructing the Indians' access to the fishing areas. *Id.* at 382.

Rejecting the landowner's arguments, the Supreme Court established a new theory of treaty interpretation: a treaty is not a grant of rights *to the Indians*, but a grant of rights *from them*, thereby implicitly containing a reservation of those rights not explicitly granted. Further, the Supreme Court found that such reservations of rights encompassed all the territory subject to the treaty, thereby imposing a "servitude upon every piece of land." *Id.* at 381. Thus, the Court concluded that the starting point for analysis of the treaty is the Indians' pre-existing rights.

With respect to general canons of treaty construction, the Court beings with the premise that the parties' intentions dictate the interpretation of a treaty. *Choctaw & Chickasaw Nations*, 179 U.S. at 531. In determining those intentions, the Court must

interpret words in a treaty according to their natural and ordinary meanings, when the words are unambiguous. *Id.* It is only when a court finds a word to be ambiguous that it may resort to extrinsic evidence. *Id.*

In addition, treaties may, when necessary, be interpreted in light of the surrounding historical circumstances. *Choctaw Nation v. United States*, 318 U.S. 423 (1943). Thus, the Court looks to the historical context surrounding the negotiations of the Stevens Treaties. The Court also finds the following canons of construction instructive: (1) a treaty should not be interpreted so as to render one part inoperative, *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); (2) when the parties could have more easily expressed a particular intent by an alternative choice of words, the chosen words can be interpreted NOT to express that intent, *Choctaw & Chickasaw Nations v. United States*, 179 U.S. 494, 538 (1900); and (3) that the practical construction adopted by the parties, namely post-treaty conduct, may be viewed to help determine the meaning of the treaty. *Choctaw Nation v. United States*, 318 U.S. 423, 434 (1943).

Following these canons of construction, the Court finds that, when signing the Treaties at issue, the Tribes reserved the right to take shellfish from their usual and accustomed grounds and stations, subject only to the Shellfish Proviso. Furthermore, the words "staked or cultivated" in the proviso are ambiguous, and the Court concludes that the Shellfish Proviso does not apply to a natural or native beds and that, under the Shellfish Proviso, artificial beds may be staked or cultivated, notwithstanding their location in private tidal lands. The Court interprets these relevant words in this way because of the reservation of rights by the Tribes, the historical context of the treaties, and the rules favoring the resolution of ambiguities in favor of Indian Tribes; in addition, the Court finds the plaintiffs' evidence as to the meaning of these words to be much more compelling and persuasive than the evidence opposed to it.

D. Interpretation of the Proviso and Allegations of Hardship

In this sub-proceeding, the Court was not asked to determine which tidelands or marine areas contain natural beds open to Indian fishing, and which contain artificial beds, those staked or cultivated beds not open to Indian fishing; thus this decision does not resolve those issues. Rather, this decision is meant only to determine the meaning of the Shellfish Proviso in

the Stevens Treaties and what effect it has on the tribal right to take shellfish.

In reaching its decision, the Court may not rewrite the Treaties or interpret the Treaties in a way contrary to settled law simply to avoid or minimize any hardship to the public or to the intervenors. Indeed, the Court has no such power. Rather, amelioration from such hardships should be sought from Congress, which has the power to abrogate the treaty, or from the State of Washington, which sold the public tidelands without notice to the buyers of the pre-existing tribal fishing rights, and indeed the United States, which permitted such sales to occur without taking steps to secure such fishing rights.

II. INTERPRETATION OF TERMS IN THE STEVENS TREATIES

The resolution of the parties' contentions in this sub-proceeding depends on the interpretation of the Stevens Treaties. The Court had occasion to interpret some of the relevant language in *Washington I*, and finds those interpretations binding in this action. The language of the Shellfish Proviso however, has not been interpreted by the Court; thus, an extensive discussion of language and the meaning of the language is necessary.

A. Prior holdings

1. The Right of Taking Fish Includes the Right to Take Shellfish

The Court held on September 2, 1993, that the "right of taking fish" in the Stevens Treaties includes the right to take shellfish. The Court reached this conclusion without reference to the canons of constructions favoring Indians. Indeed, this interpretation is compelled by the plain language of the Treaties.

As previously discussed, the Shellfish Proviso limits the Tribes' right to take shellfish to those beds not "staked or cultivated" by citizens. This Proviso, plainly read, constitutes an exception to the right of taking shellfish at particular locations. It inevitable follows that shellfish were included in the "right of taking fish" referred to in the first sentence.[5] This interpretation

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[5] The Court does not believe that such a right can be found in the provisions reserving the Indians' right to hunt, gather roots and berries, and pasture horses.

is consistent with the principle that a treaty "should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). If the right of taking "fish" did not include shellfish, the entire shellfish proviso would serve no purpose.

2. The Right to Take Fish is not Limited to any Particular Species of Fish

Defendant and the intervenors have argued that the "right of taking fish" must be limited to those species of fish the Tribes actually took prior to the signing of the Stevens Treaties. At that time, however, the Tribes had the absolute right to harvest any species they desired, consistent with their aboriginal title. *See Lac Court Oreilles Band, Etc. v. Voigt*, 700 F.2d at 352. The fact that some species were not taken before treaty time--either because they were inaccessible or the Indians chose not to take them--does not mean that their *right* to take such fish was limited. Because the "right of taking fish" must be read as a reservation of the Indians' pre-existing rights, and because the right to take *any* species, without limit, pre-existed the Stevens Treaties, the Court must read the "right of taking fish" without any species limitation.

The effort by the defendants to read a species limitation into the "right of taking fish" must fail in light of the canons of construction favoring Indians. Defendant and the intervenors ask the court to impose a limit on the "right of taking fish" without pointing to any treaty language in support of that interpretation. This is impermissible under *Winters* and *Choctaw Nation*. Moreover, had the parties to the Stevens Treaties intended to so limit the right, they would not have chosen the word "fish," a word which fairly encompasses every form of aquatic animal life. "Fish" has perhaps the widest sweep of any word the drafters could have chosen, and the Court will not deviate from its plain meaning.

3. "All Usual and Accustomed Grounds and Stations"

Washington I made a series of determinations as to the meaning and import of the phase "usual and accustomed grounds and stations," in the context of adjudicating where the plaintiff Tribes enjoyed the right to fish for salmon and steelhead. No party to this sub-proceeding has challenged these determinations, and the Court finds, as explained below, that they are the usual and accustomed grounds and stations for shellfishing.

At trial, the Tribes presented evidence establishing areas in which they historically sought shellfish. However, before considering this evidence, the Court must resolve a preliminary issue of treaty interpretation: whether the usual and accustomed areas for shellfish can, as a matter of law, differ from the areas adjudicated in *Washington I* for salmon and steelhead. If the Court determines that they cannot, then the areas established in *Washington I* control this sub-proceeding as well.

The Court finds that, as a matter of treaty interpretation, the Tribes' usual and accustomed grounds and stations cannot vary with the species of fish. This conclusion is consistent with the Court's prior ruling finding the Tribes' usual and accustomed grounds and stations for herring as co-extensive with those for salmon and steelhead. *See Post-Trial Decisions*, 459 F.Supp. at 1048-50. Indeed, the Court has never focused on a particular species of fish in determining the Tribes' usual and accustomed grounds and stations. *See e.g.*, *Washington I*, 384 F.Supp. at 360, 364, 372; *Post-Trial Orders*, 626 F.Supp at 1467, 1528-29.

Therefore, the Tribes have the right to take shellfish at those usual and accustomed grounds and stations adjudicated in *Washington I*, including all bedlands and tidelands under or adjacent to those areas. In addition, however, the Upper Skagit Tribe, seeks to establish its usual and accustomed grounds and stations as those of the Nuwha'ha and the Bsigwigwilts, as well as other predecessor tribes. *See infra* Part VII. Other than the evidence put on by the Upper Skagit, the Tribes have stipulated in this sub-proceeding not to present evidence proving usual and accustomed grounds and stations beyond the prior-adjudicated grounds and stations.

4. "In Common With All Citizens"

The meaning of the term "in common with all citizens" is well-settled. "Both sides have a right, secured by treaty, to take a fair share of the available fish." *Fishing Vessel*, 443 U.S. at 684-85. According to the Supreme Court, to determine this "fair share" a court should "initially divide the harvestable portion of each run . . . into approximately equal treaty and non-treaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount." *Id.* at 685. The lower boundary--this "lesser amount"-- is determined by analyzing the tribes' "moderate living" needs. *See infra* Part IV. The important

concept here, however, is that the "in common with" language guarantees the Tribes a share of the fish and an "equal opportunity" to catch the fish. See *Fishing Vessel*, 443 U.S. at 679.

B. The Shellfish Proviso: "Any Beds Staked or Cultivated by Citizens"

1. Interpretations Proposed by the Parties

The intervening growers' proposed interpretation of the Shellfish Proviso starts and ends with the treaty-time dictionary. They argue that the Court should interpret "staked" and "cultivated" according to their dictionary definitions; essentially, this would mean that any shellfish bed extant today that is surrounded by stakes, or in some fashion improved by human labor, would be off limits to the Indians. The Tribes do not dispute that, under the definition of the treaty words advanced by the growers, all of the tideland owned or leased by the Growers falls within the Shellfish Proviso.

The intervening property owners depart to some extent from this literal approach arguing that "staked" should be interpreted in its "frontier" context and thus should be regarded as a synonym for "claimed as private property." Therefore, all privately-owned tideland, whether or not surrounded by stakes, would be protected by the Shellfish Proviso.

The Plaintiff Tribes' argue first that the terms "staked" and "cultivated" must be interpreted as they were *used* in the shellfishing industry at treaty time. This *usage* of the terms "staked" and "cultivated" by the shellfishing industry has two elements: the doctrinal definition and the empirical definition of the words, which is informed not by a dictionary, but by the actual practices of the shellfishing industry. Thus, while the doctrinal definition of the words might contemplate a broad set of activities, the empirical definition captures that narrower subset of activities that were actually performed at treaty time.

As will be shown below, the Tribes presented compelling evidence that only artificial beds were "staked" and "cultivated" at treaty time.

2. *"Doctrinal Definition" of Shellfish Proviso Terms Within Shellfishing Industry*

a. "BEDS"

The intervening growers presented evidence at trial that shellfish "beds," as that term was used at treaty time, included both natural and artificial shellfish deposits. Ingersoll's Glossary of Shellfish Terms ("Ingersoll's") defines "bed" as "The bank, reef or deposit of oysters in the water, either growing naturally or artificially, original or transplanted." The Tribes have not disputed Ingersoll's as the appropriate definition, and the court will rely upon that definition in its analysis.

b. "STAKED"

The parties agree that the words "stake" and "staked" were commonly used in the shellfishing industry at treaty time. To "stake" a shellfish bed meant to plant stakes or other markers to indicate the boundaries of the bed.

c. "CULTIVATED"

Within the shellfishing industry at treaty time, the meaning of the terms "cultivate" and "cultivated" was quite narrow. Ingersoll's defines "cultivate" as "to raise oysters artificially from spawn, or from transplanted young."

The defendant and the intervenors have presented no evidence to directly contradict Ingersoll's definition of "cultivate." The intervening growers have shown that nineteenth-century oyster farmers performed a variety of activities to improve their harvest. Indeed, Moore states in his treatise that "all methods of oyster culture depend for their success upon the modification of the natural conditions in such a manner as to bring about one or several of the following results," such as the increase in the number of eggs and the increase in the surfaces available for fixation.

Reading Ingersoll's and Moore together, cultivation is the "modification of natural conditions" occurring after the oysters have been planted or transplanted in an artificial bed.

3. *"Empirical Definition" of the Terms "Staked" and "Cultivated" as They Were Used in the Shellfishing Industry*

At trial, the Tribes presented substantial evidence of the actual use of the terms "staked" and "cultivated" within the shellfish industry. This evidence falls into two categories. First, the Tribes attempted to reconstruct, state-by-state, the legal landscape governing the shellfish industry. The Tribes argue that at the time the Treaties were negotiated, the shellfishing laws almost universally prohibited the "staking" or "cultivating" of natural shellfish beds. Second, the Tribes presented evidence of actual shellfish industry practices, both on the East Coast and in Shoalwater Bay, Washington. The Tribes maintain that these practices, as might be expected, conformed to the laws governing the industry, thus no actual "staking" or "cultivating" of natural beds occurred at that time.

a. Laws Governing Shellfishing Practices

As part of an 1876 report, "On the Oyster Industries of the United States," Lieutenant Paul DeBroca authored a chapter entitled "Oyster Culture," in which he described "American ostriculture" as consisting of the "planting of mollusks on those parts of the coast where the submarine soil is best fitted by its nature to fatten them and promote their growth."[6] In this chapter, DeBroca makes the following critical observation:

> Whatever may be the locality chosen by the planters, they can in no case pursue their industry on the natural banks of oysters, the common property of the people, or in any way interfere with the free exercise of navigation.[7]

DeBroca defines "natural bank" as a "conglomeration of mollusca presenting a character of continuity, constituting what is usually called an oyster-bed."[8]

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[6] PL-237 at 296.

[7] *Id.* at 297.

[8] *Id.* at 297. DeBroca elaborates:

> The natural bank may be single or formed of several small banks, separated by greater or less spaces, but always sufficiently connected to be considered parts of one whole. As to places where, through

DeBroca's characterization of the legal landscape regarding natural shellfish beds is supported by the statutes and case law in force during the mid to late nineteenth-century.[9]

For example, a series of laws were enacted in the Washington territory concerning oysters and oyster cultivation after the signing of the Stevens Treaties.[10] Despite the fact that

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accidental circumstances, isolated oysters have developed, they are not classed among the natural beds, since, if this were the case, the largest part of the submarine soil of the coast would be under interdiction and oyster culture would be impossible. However protective the American laws may be in what concerns public property, they are careful not to interfere with private enterprise by a too rigorous interpretation of the term *public property*.

DeBroca at PL-297.

[9] *See also* Angell, Treatise on the Right of Property in Tidewater (1847), PL-428 at 139 ("Oysters . . . . may be taken and thus become the property of him who takes them, and if he plants them in a new place flowed by tide water, visibly denoted, and *where there are none naturally*, and for his own particularly benefit, it is not regarded as an abandonment of his property in them," (emphasis added).

[10] The following laws were passed in the Washington Territory:

(1) An Act for the Preservation of Oysters in Shoalwater Bay, January 13, 1855:

> And be it enacted, that it shall not be lawful from and after the first day of June, until the first day of August, yearly, and every year, for any person or persons to rake, scrape, or gather any oysters from any of the oyster beds in Shoalwater Bay under any pretense, whatsoever; Provided, that nothing in this section shall be so construed as to prohibit any persons from taking oysters from beds planted out by him or them.

2. An Act to Encourage the cultivation of Oysters, January 16, 1861:

> Be it enacted . . . . That any person, being a citizen of this Territory, who has planted, or who hereafter may plant oysters in any bay or arm of the sea, *where there are no natural beds of oysters*, within or bordering upon this Territory, may acquire, by conforming to the requirements of this act, an exclusive right for such a purpose . . . .

the laws post-date the Treaties, the court nevertheless considers them important. First, each of these enactments, including the law related to Oyster preservation in Shoalwater Bay, provides separate treatment of natural and planted oyster beds. Second, the legislation, beginning with the 1861 Act to Encourage the Cultivation of Oysters, conforms exactly to DeBroca's characterization and permits the planting of oysters in areas except where natural oyster beds exist. Finally, these post-treaty enactments, by specifically recognizing property rights in planted oyster beds, imply that there was no common law property rights in planted beds, let alone natural beds, at or before treaty time.[11]

Moreover, many laws from other states also demonstrate the general rule of no staking or cultivating of natural beds. [12]

> The person desiring the benefits of the preceding section, shall cause the place or portion he desires to claim, to be marked so far as is practicable with stakes or other artificial marks at the corners. . . . and shall make, before some officer qualified to administer oaths, an affidavit that he has taken the premises so described, for the purpose of planting oysters, and that he has planted, or is about to plant oysters thereon, that said premises are not upon ad do not include any natural bed of oysters . . . .

3. An Act to Encourage the Cultivation of Oysters, January 24, 1863. Contains same language as 1861 law.

4. An Act to Encourage the Cultivation of Oysters, November 5, 1873. Contains same language as 1861 law.

5. An act to Amend an Act Entitled An Act to Encourage the Cultivation of Oysters, November 6, 1877. Contains same language as 1861 law.

[11] On the other hand, the Growers point out that in 1864, the Washington Territorial Legislature passed "An Act to Authorize Wm. Horton, Wm. N. Horton and Wm. A. Busey, their Heirs and Assigns to Plant, Cultivate and Gather Oysters on Totten's Inlet." This Act gave the named individuals "the exclusive privilege to plant, cultivate and gather oysters in so much of Totten's Inlet as lies within [designated limits]." Under the terms of this grant, it is possible that the grantees would enjoy private property rights in natural oyster beds. However, the Court does not consider this single grant to three individuals to constitute a significant part of the legal landscape in the Washington Territory.

[12] The following are laws and cases from other states that reflected the general rule of no staking or cultivating of natural beds: An Act Concerning Oysters, April 28, 1851 (Ca.); An Act Regulating and Protecting the Planting of Oysters, June 23, 1855 (Conn.); An Act in Addition to an Act Entitled "An Act

This survey of laws and statutes, both from the East Coast and California, is consistent with DeBroca's characterization of the legal landscape, namely that one could not stake off and appropriate for private use a natural oyster bed at or before treaty time. Indeed, most of the statutes from these areas created new private property rights in *planted* beds, thereby implying that *before* passage of the legislation, no such rights existed.

b. Actual Shellfishing Practices

i. East Coast Practices

For the most part, the Court will assume that practices on the East Coast conformed with the laws governing the industry. Furthermore, the Angell treatise[13] and the DeBroca article[14] indicate that oyster farming, in practice, took place on artificial beds in the nineteenth-century.[15]

ii. West Coast and Shoalwater Bay Practices

The evidence indicates that the practices at Shoalwater Bay at and before treaty time were similar to those on the East Coast. In his 1854 "Report on a Reconnaissance of the Country Lying Upon Shoalwater Bay and Puget Sound," George Gibbs made the following remark:

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for the Growing of Oysters," June 13, 1845 (Conn.); An Act to Encourage and Protect the Planting of Oysters, August 15, 1849 (Maine); An Act Concerning the Planting of Oysters, April 21, 1848 (Mass.); An Act Relative to the Fishery in Certain Waters, 1813 (N.Y.); An Act concerning oysters and terrapins and the penalties in regard to them, March 22, 1847 (Va.); *Decker v Fisher*, 4 Barb. 592, 595 (N.Y. 1848).

[13] See PL-248 at 139.

[14] See PL-237 at 286, 297.

[15] For instance, the following item appeared in *Ballou's Pictorial Drawing Room Companion* on September 9, 1855:

> The oysters here are mostly brought in the spring from the coasts of Virginia and Delaware and are planted about a mile from the shore, the boundaries of each man's plantation being designated by stakes, as shown in our engraving. PL-197.

> The principal trade, so far, has been in oysters, which abound on the flats. They are taken up, during the low tides of summer, from their natural beds, separated, and replanted, as in the States.[16]

Similarly, on August 26, 1854, the *Pioneer and Democrat*, a local newspaper, contained the following description of the shellfishing practice at Shoalwater Bay:

> The method of propagating oysters is to dig them up with tongs . . . When dug up, the oysters are separated from the mass and buried about low-water mark, or even to high-water mark, so that the tide may ebb and flow over them. . . .[17]

In addition, on January 6, 1855, the following appeared:

> We are credibly informed that there are some thirteen streams emptying into Shoalwater Bay; that there are then at the present time a large community, who are cultivating, in true Chesapeake Bay style, the oyster . . . .[18]

c. How Shellfish Laws and Practices Lead to an "Empirical Definition"

The shellfish laws and practices do give rise to an "empirical definition" of "staked" and "cultivated." The Court can ascertain an "empirical definition" of treaty words by viewing the words as they would have been viewed by the parties who participated in the treaty negotiations. In determining the parties' understanding of the words, the Court must consider the parties' actual experience with the words.

First of all, there is no doubt that the United States treaty negotiators were generally familiar with the East Coast shellfish industry and its practices. As outlined above, the East Coast shellfish industry followed a set of laws and practices whereby natural oyster beds were almost never "staked" or "cultivated." Furthermore, the evidence indicates that both George Gibbs and

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[16] Gibbs, PL-186 at 465.

[17] PL-236.

[18] PL-234.

members of the signatory Tribes were familiar with the shellfishing practices occurring at Shoalwater Bay at treaty time. Indeed, as discussed in the previous section, the practices at Shoalwater Bay were modeled after East Coast practice: oyster farmers cultivated oysters by transplanting them to artificial beds and under no circumstances did they "stake" or "cultivate" natural beds. The "empirical definition" is one possible construction of the terms "staked" and "cultivated."

4. Resolution of Meaning of "Any Beds Staked or Cultivated"

The Court must interpret the Shellfish Proviso giving due regard to both the canons of construction favoring the Indians and the general principles of treaty interpretation. In this section, the Court analyzes the Shellfish Proviso in light of: (1) the surrounding treaty words, (2) the record of the treaty negotiations, (3) the historical circumstances that gave rise to the Stevens Treaties, (4) the possible alternative formulations of the Shellfish Proviso, and (5) the post-treaty conduct of both parties. Thereafter, the Court will conclude by presenting its understanding of the correct interpretation of the Shellfish Proviso.

a. The Shellfish Proviso Viewed in Light of the Record of treaty Negotiations

The perspective and positions of the parties throughout the negotiation process can also shed light on the meaning of the shellfish proviso. To the extent that one party's statements--or silence--reflect its understanding of the other side's proposals, evidence of the negotiation process is persuasive evidence of the Shellfish Proviso's intended meaning.

The parties agree that the minutes of the treaty negotiations reflect no specific discussion of the Shellfish Proviso. However, certain statements in the treaty minutes are instructive as to the proper interpretation of the Shellfish Proviso, and the absence of certain statements of discussions reveals the intentions of the treating parties.

The most striking aspect of the treaty minutes is the paternal pose struck by the United States negotiators, including Governor Stevens himself. For example, Stevens made the following statement to the Tribes during the negotiations:

> I think the paper is good and that the Great Father will think so. Are you not my children and also children of the Great Father? What will I not do for my children and what will you not for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? This paper gives you a school? Does not a father send his children to school? It gives you mechanics and a Doctor to teach and cure you. Is that not fatherly? This paper secures your fish. Does not a father give food to his children? Besides fish, you can hunt, gather roots and berries. Besides it says you shall not drink whiskey and does not a father prevent his children from drinking the fire water?

There is no dispute that the United States negotiators intended to act in good faith towards the Indians; thus, the court cannot view the paternal tone as a strategic negotiating tactic, or as a form of sharp dealing. And, in deed, there were specific, tangible promises made by the United States to back up its paternal tone.

The one significant promise for purposes of this litigation is the promise by the United States to the Indians that they would enjoy a permanent right to fish as they always had. This right was promised as a sacred entitlement, one which the United States had a moral obligation to protect. The Indians were repeatedly assured that they would continue to enjoy the right to fish as they always had, in the places where they had always fished. There is no indication in the minutes of the treaty proceedings that the Indians were ever told that they would be excluded from any of their ancient fisheries.

The second most striking aspect of the treaty minutes is an absence of protest over the loss of shellfishing rights. It is clear from the treaty minutes that with respect to fishing rights in general, the guarantee of fishing rights was a *sine qua non* of the Indians' participation in the Treaties. The Indians repeatedly raised concerns that they would not survive if they did not have access to their ancient fisheries. Juxtaposed with these expressions of concern, and demands for continued fishing rights, is an absolute silence regarding the Shellfish Proviso. The evidence indicates that the Treaties were read and explained section by section to the Indians during the negotiation process. Yet the minutes reveal no instance where the Indians resisted the Shellfish Proviso.

Thus, the minutes of the treaty negotiations to some extent undermine the interpretations offered by the Defendant and the intervenors. Whether "staked" is taken literally to mean the planting of stakes in the tideland, or taken figuratively as the claiming of private property, it would provide a means for settlers to exclude the indians from natural shellfish beds where the Indians had always taken shellfish. This is simply inconsistent with the statements made by the United States and the absence of protest from the Tribes, both of which are reflected in the treaty minutes.

If the Shellfish Proviso merely operated to exclude Indians from artificial beds, it would not likely have been a serious point of contention during the negotiation process. As a result, this interpretation is perfectly consistent with the United States' solemn promise that the Indians would have a permanent right to their ancient fisheries.

b. The Shellfish Proviso Viewed in Light of the Historical Circumstances Surrounding the Negotiation of the Stevens Treaties

Just as the record of the treaty negotiations is direct evidence of the parties' intentions, the historical circumstances surrounding the negotiation process are indirect evidence. These circumstances provide the Court with additional information to determine the meaning of the Shellfish Proviso.

i. The United States' Purpose In Entering Stevens Treaties

The United States' motivation for entering into the Stevens Treaties was examined in *Washington I*, in *Fishing Vessel*, and by this Court based upon the evidence presented in this sub-proceeding. The United States' primary purpose was to extinguish the Indians' title to the lands in Western Washington, thereby clearing the way for settlement by Europeans. It was hoped that, by moving the Indians onto reservations, the Treaties would minimize the friction and permit amicable relations between the settlers and the Indians. Of course, the United States recognized that to achieve its primary purpose, it would have to pay some price. Further complicating matters, however, was the fact that the United States wanted to execute the Treaties as quickly as possible.

The United States was aware that the Indians used and relied on fish, including shellfish, for subsistence, ceremonial and commercial purposes; thus it was clearly necessary to preserve the Indians' fishing rights. In fact, the United States viewed this concession as serving its own interest to some extent: indeed, the treaty negotiators did not want the Indians to become dependent upon the United States for their subsistence and a reservation of fishing rights would insure against this possibility. At the same time, the United States believed that guaranteeing the Indians fishing rights would "not in any manner interfere with the rights of citizens." Finally, the United States intended to act honorably towards the Indians, and the negotiators believed that it never could have been the intention of Congress that the Indians should be excluded from their ancient fisheries and expressed among themselves the intention to preserve Indian fishing rights.

Overall, the Tribes' interpretation of the Shellfish Proviso is most consistent with the United States' purposes in entering the Stevens Treaties. The interpretation does not in any way conflict with the historical findings of fact concerning the United States' purpose in entering the Treaties. The defendant and the intervenors point to the potential conflict arising from enforcing the Tribes' interpretation of the Shellfish Proviso, and on that basis argue that the Tribes' interpretation contradicts the United States' intention to avoid conflict between Indians and settlers. The United States, however, did not intend that the Indians would relinquish their ancient fishing rights on demand by settlers. Further, under the Tribes' interpretation, there would be no conflict between Indians and settlers, so long as the Indians respected the settlers' planted oyster beds and the settlers did not stake out natural oyster beds where the Indians took fish.

The Defendants' and intervenors' proposed interpretations are also generally consistent with the United States' purposes in entering the Treaties, *except in one important respect*: neither of these interpretations is consistent with the United States' avowed intention to preserve for the Indians their ancient fisheries. Whether "staked" is viewed literally or in its frontier sense, it permits the gradual exclusion of Indians from natural shellfish beds, a result clearly unwanted and unintended by the parties to the Treaties.

ii. The Tribes' Purpose In Entering Stevens Treaties

The evidence indicates that the Tribes' purpose in entering the Stevens Treaties was to secure land and livelihood for their

members who faced an aggressive waive of European settlement. Tribal leaders and members believed that without recourse to their ancient fisheries, they would perish. Whatever land concessions they made, the Indians viewed a guarantee of permanent fishing rights as an absolute predicate to entering into a treaty with the United States.

Under the Tribes' interpretation the Indians would have a permanent right of access to their ancient fisheries. Conversely, the defendant's and intervenors' proposed interpretations of the treaty simply do not recognize that the Indians were bargaining for a permanent right; rather, they seem to rely on the proposition that the Indians believed that their need for shellfish would diminish over time. This supposition, however, lacks any evidentiary support and is contradicted by the overall weight of the evidence. Accordingly, the Tribes' position is more consistent with this facet of the Treaties' historical context.

iii. The United States' Vision for the Washington Territory

The parties agree that Governor Stevens was not a short-term thinker who was motivated solely by considerations of expediency. Both sides characterize Stevens as a self-conscious historical actor who proceeded cautiously, guided by a vision for the future of the Washington Territory. The parties even agree on some aspects of the substance of Stevens' vision for the Washington Territory; not surprisingly however, on other aspects, they sharply disagree. The Court must resolve these differences in its attempt to recreate Stevens' vision as part of the overall context in which to interpret the Shellfish Proviso.

A. Shellfish Industry in the Washington Territory

First, the parties agree that Stevens envisioned the development of a thriving oyster farming industry in the Puget Sound. Dr. Richards, an expert for the defendant and intervenors, gave the following testimony at trial:

> Q. Do you have any opinion as to whether or not Stevens and his treaty commissions envisioned similar industries [as to those in Shoalwater Bay] developing in the Puget Sound area?
>
> A. I'm sure they did. The newspapers, particularly the *Pioneer and Democrat*, mentioned the possibility of

this occurring and in fact reflected some dismay that it had not occurred already.

But certainly I think it is safe to say that they envisioned the shellfish industry as well as many other industries appearing in the territory on the Sound.

The Tribes' interpretation is most consistent with this vision. The oyster farming industry, as constituted at treaty time, was built on artificial beds. As previously discussed, transplanting oysters from natural beds and seeding artificial beds were the principal method of oyster culture at treaty time, both on the East Coast and at Shoalwater Bay. Stevens' vision of the oyster industry most likely conformed to existing practices; indeed, the record is devoid of any evidence that Stevens or any of the United States' negotiators held any ideas of reforming industry practices. Thus, to protect the fledgling oyster industry, Stevens might have felt it necessary to exempt artificial beds from the Indians' treaty right to take fish. Under the Tribes' interpretation, the Shellfish Proviso is narrowly tailored to do just that.

Under the competing interpretations, the Shellfish Proviso is not designed specifically to protect the oyster industry; depending on the circumstances, it could either aid or hinder the industry's development. To the extent it prohibited Indians from taking shellfish from both artificial and natural shellfish beds where settlers were engaging in fruitful harvesting, it would aid the development of the industry. However, both the literal and figurative interpretation of "staked" advanced by defendants and the intervenors protect activities, such as tideland ownership, wholly unrelated to the oyster industry. Under either interpretation, a settler--either by placing stakes or by claiming ownership to a tideland parcel--could preclude Indians and non-Indians from taking shellfish from natural beds located on that parcel. The settler could then ail to harvest the shellfish, and the Indians would be forbidden from fishing there. Under these circumstances, it would not foster, but instead undermine, the development of an oyster industry. Accordingly, the Tribes' proposed interpretation is preferable because it is wholly consistent with the notion of fostering the shellfish industry.

B. Tideland Development in the Washington Territory

The parties also agree that the United States negotiators anticipated industrial and urban development in the relevant geographical area, and expected that mills, ports and eventually

cities would be erected on the tidelands. Indeed, prior to treaty time, the United States engaged in numerous projects to develop the tidelands, including diking and reclamation of land, and dredging and channelization of watercourses.

The effect of development on the Shellfish Proviso is on of the most perplexing issues in this case. The Tribes have no claimed a right to take shellfish from areas where natural beds no longer exist, such as from tideland areas housing factories, the Kingdome, and mills and ports. The Tribes appear to have conceded that the some of the development along the tidelands, but not all, has extinguished their right to take fish from those particular areas. The only type of development that extinguishes the Tribes' right to take shellfish, however, is that development which also extinguishes the shellfish beds. Thus, in any area, where natural shellfish beds remain--regardless of whether the areas is privately owned or leased and regardless of the activity occurring upon the land--the Tribes' right to take fish remains.

What, then, of Isaac Stevens' vision? Stevens did not perceive a conflict between his vision of tideland development and his desire to preserve the Indians' aboriginal fishing rights. First, the United States negotiators believed that the supply of fish, including shellfish, was abundant and seemingly inexhaustible. It appeared unlikely that the tideland development would prejudice, in a tangible way, the Indians' right to take fish. Second, the United States negotiators were aware of the thriving shellfish industry in fully-developed East Coast cities, and likely assumed based on those examples that development in the Puget Sound and on the western shore would not interfere with the Indians' exercise of their treaty fishing rights. Consequently, neither the prospect nor the act of development counsel against the Tribes' interpretation of the Shellfish Proviso.

C. *Role of the Indians in the Washington Territory*

The State of Washington points out that the Stevens Treaties were negotiated during a period in which the United States adopted an "assimilation policy" towards Indian Tribes. In *Washington I*, the Court found that, at least with respect to the non-coastal tribes, the United States did envision an assimilation of Indians into western society:

> It was the intention of the United States Government, in negotiating Treaties with the Indian, to make at least non-coastal tribes agriculturists, although not restrict them to

> that, to diversify Indian economy, to reach western skills and trades to the Indians and to accomplish a transition of the Indians into western culture. There was no intent, however, to prevent the Indians from using the fisheries for economic gain.[19]

Overall, the evidence presented in this case indicates that the United States intended that Indians would, at minimum, interact with settlers in the Washington Territory, if not fully *integrate* with them. It is clear from the record that the United states intended that the Indians would continue to provide labor and to participate in the regional economy after the Treaties were signed and that the Indian would supply fish, including shellfish, to the settlers. The record in this case does not support the contention that, with respect to the Stevens Treaties, the United States intended to break down tribal affiliations of the Puget Sound Tribes and absorb the tribal members as individuals.

D. Private Ownership of Undeveloped Tidelands

There is no evidence in the record that Isaac Stevens or any of the negotiators from either side foresaw private ownership of the vast majority of tidelands and beaches of Puget Sound and western Washington.

Even if the parties anticipated the massive alienation of tidelands that occurred at the turn of the century, it does not follow that they would have expected private ownership of tidelands to have depleted or subtracted from the public fishery. To the contrary, the uniform common law at treaty time held that private ownership of a parcel of tideland did not include private rights to the shellfish on that parcel. In his 1847 Treatise on the *Right of Property in Tide Waters*, Joseph Angell opined that "[t]here is no doubt, that the public have a right to take shell-fish on the shore, though the right of soil in the shore happens to be private property."[20] Therefore, the treating parties did not view development as vacating the public's, nor the Indians,' right to fish.

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[19] *Washington I*, 384 F.Supp. at 355.

[20] *See also Peck v. Lockwood*, 5 Day 22 (Conn. 1811); *Weston v Sampson*, 62 Mass. 347 (1851); *Lakeman v. Burnham*, 7 Gray 437 (Mass. 18856); *Bickel v Polk*, 5 Har. 325 (Del. 1851); *Moulton v Libbey*, 37 Main 472 (1854).

c. The Shellfish Proviso Viewed in Light of Post-treaty Conduct by Both Parties

The parties' post-treaty conduct is particularly instructive as to the meaning ascribed to the Shellfish Proviso by the parties themselves. A party's conduct manifests its interpretation of particular language and is, therefore, evidence of their intentions.

i. Conduct of the United States

The State of Washington and the intervenors point to four aspects of the United States' conduct which, they argue, support either a literal interpretation of "staked" or an interpretation of "staked" as meaning "claimed as private property." These four aspects involve development by the United States, actions of the territorial legislature, the failure of the United States to object to the land policy of the State of Washington, and a 1905 decision of the Commission of Indian Affairs.

A. Development by the United States

The evidence is undisputed that the United States participated in the building of forts and navigation channels. Indeed, the Tribes' expert admitted that the United States expected that there would be extensive development of the tidelands.

As discussed above, however, it appears that the anticipation of development on the tidelands was a phenomenon entirely unrelated to the crafting of the Shellfish Proviso. The evidence and reasoning supporting that proposition leads to a similar conclusion with respect to the United States' post-treaty conduct: because the United States viewed shellfish resources as exceptionally abundant, and because the United States was aware of thriving shellfishing operations in fully developed cities, it presumably did not view its participation in post-treaty tideland development as a derogation of the Indians' right to take fish. This conduct, then, does not weigh in favor of the defendant's and intervenor's proposed interpretation.

B. Actions of the Territorial Legislature

The State of Washington and the intervenors also point to the actions of the United States Territorial Government in the

period between the signing of the Treaties and Washington's admission to the Union. The evidence indicates that the United States territorial legislature granted a parcel of tideland in the Totten Inlet to private owners in 1864. Furthermore, it was the territorial legislature, not the State of Washington, that first allowed citizens the exclusive use of natural oyster beds in 1879.[21]

Evidence of the actions of the territorial legislature does tend to support the interpretations of "staked" and "cultivated" offered by the defendants and the intervenors. The Court considers it significant, however, that neither of these dispositions occurred until *ten years after the signing of the Treaties*; furthermore, the 1879 Act, which represents the first substantial step in privatizing the tidelands, *did not occur until 25 years after the Treaties had been signed.* Accordingly, the weight of this evidence in support of the defendant's and the intervenors' interpretation is reduced by the passage of time between the signing of the Treaties and these actions of the territorial legislature.

C. *The Failure of the United States to Object to the Land Policy of the State of Washington*

The third aspect of the United States' post-treaty conduct cited by the State and the intervenors is the United States' silence while Washington executed its policy of alienating tideland parcels to private owners. Washington became a state in 1889, and in 1895 it passed legislation (the "Bush" and "Callow" Acts) for the private purchase of tidelands, even when those tidelands contained natural shellfish beds. There is no evidence that the United States intervened on behalf of the Indians, by threat of litigation or otherwise, when the legislation was passed in 1895.

This evidence, like the acts of the territorial legislature, tends to support the interpretation offered by the State and the intervenors. Again, however, the probativeness of this evidence is considerably weakened by its remoteness in time from the execution of the Treaties. The passage of the Bush and Callow

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21 *See* An Act to Amend an Act Entitled "An Act to Encourage the Cultivation of Oysters," (Approved November 14, 1879), Laws of the Washington Territory, enacted by the Legislative Assembly in the Year 1879 (Olympia: C.B. Bagley, Public Printer, 1879) at 118-20; White, PL-160 at Ch. II, 52] [*sic*]

Acts, and the United States' subsequent inaction, did not occur until forty years after the Stevens Treaties were signed. It should further be noted that neither the Territory nor the State of Washington could terminate pre-existing federal treaty rights by simply selling the land in which those rights existed.

D. 1905 Decision by the Commissioner of Indian Affairs

Finally, Defendant and the intervenors argue that a 1905 letter-opinion by the Commissioner of Indians Affairs reflects a broad interpretation of the Shellfish Proviso by the United States. In 1905, Harry Liston, the Superintendent of the Puyallup Indian Agency, wrote a letter to the Commissioner of Indian Affairs relaying a complaint from the S'Klallam Indians seeking advice.[22] The S'Klallams complained of their recent exclusion from their usual and accustomed clam digging areas by three men claiming to have leases to the tidelands. [23] In response, the Commissioner responded that

> it is the opinion of this office that such lands are under the control and jurisdiction of the State; that the Indians should not be permitted to trespass upon the tide lands leased from the State; that in case they desire special privileges as to the digging of clams from the tidelands referred to, it will be necessary for them to lease the same from the State of Washington. . . . However, *if there are tide lands used in common* by the citizens of that region, the Indians, under said article IV, have the right to take fish, clams, etc. from such lands.[24]

This correspondence has no relevance to the appropriate interpretation of the Shellfish Proviso. It is absolutely clear from the underlined portion of the commissioner's letter that he based his opinion on the belief that the Indians' treaty could only be exercised on "in common" lands; his letter makes no mention of the Shellfish Proviso as a basis upon which Indians could be excluded from the leased tidelands. Moreover, this opinion was voiced nearly a half century after the Stevens Treaties were signed.

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[22] *See* Letter dated February 14, 1950, D-122.

[23] *See id.*

[24] Letter dated March 20, 1950, D-123 (emphasis added).

In sum, the United States' relevant post-treaty conduct does not strongly support the interpretation advanced by the State of Washington and the intervenors. Granted, the cited conduct points to gradual erosion of the Indians' fishing rights; however, the fact that these rights became decimated over time does not imply that did not exist in the first instance.

ii. Conduct of the Signatory Tribes

The State and the intervenors also rely on the Indian response to the Bush and Callow acts to support their interpretation. The evidence indicates that some individual members of the plaintiff Tribes purchased tidelands under the Bush and Callow Acts. Furthermore, the record contains only one instance of Indian protest regarding the alienation of tidelands by the Territorial Government and the State of Washington. That one example, cited by Plaintiff's expert, Dr. White, is the complaint of the S'Klallam tribe that precipitated the 1905 letter opinion by the Commissioner of Indian Affairs.

The purchase of tideland by individual Indians, however, has little if any probative value, as to the meaning of the Shellfish Proviso. No evidence exists that these individuals' actions were taken pursuant to their understanding of the Shellfish Proviso; rather, the evidence indicates that these individuals were simply responding to a massive land rush and taking all possible steps to safeguard their access to fish and their personal self-interests.

Thus, the proffered evidence of the Tribes' post-treaty conduct does not weigh heavily in favor of the defendant's and intervenors' proposed interpretations.

d. Conclusion

The Court interprets the terms "staked" and "cultivated" as the terms were defined and used in the shellfishing industry at and before treaty time. At treaty time, the term "cultivate" was defined in the shellfish context by Ingersoll as an activity occurring only on artificial beds. In addition, consistent with the virtually uniform body of state statutes and common law, the activities of "staking" and "cultivating" occurred only on artificial beds. When the parties used these terms in the Shellfish Proviso, they intended only to exclude Indians from artificial, or planted, shellfish beds; they neither contemplated nor desired that the Indians would be excluded from natural shellfish beds.

Therefore, the words "any beds staked or cultivated by citizens," describe artificial shellfish beds created by private citizens. Moreover, at treaty time, artificial beds contained shellfish deposited for either growing or storage purposes, and were surrounded by stakes or other markers to the extent that they did not interfere with navigation. Thus, clearly, as has been explained, the intervenor growers' farms, which are artificial beds as herein described, are "staked or cultivated," as that clause has been interpreted by the Court. Such beds are not subject to fishing by the Tribes, except to the extent that natural clam beds may be subjacent to the staked or cultivated shellfish beds, as explained below. Finally, it is also clear that the intervenor private property owners' natural beds are *not* "staked or cultivated;" thus natural beds, if any, located on privately owned tidelands, are part of the tribal fishery.

In the preceding sections, the Court evaluated the evidence in accordance with the principles of treaty interpretation established by the Supreme Court. The analysis in those preceding sections overwhelmingly supports the Tribes' proposed interpretation of the Shellfish Proviso. First, and most importantly, in interpreting the Shellfish Proviso, the Court must focus on what the Indians intended: the record unequivocally reflects the Indians insistence on reserving the right to fish as they always had, and the record is devoid of any objections or concern over their exclusion from ancient shellfish fisheries.

Second, the focus must be on what the Indians understood. Indeed, because only artificially planted beds were "staked" or "cultivated" at Shoalwater Bay, it is unlikely that the Indians would have understood these words to exclude them from natural shellfish beds.

Finally, the focus is on what the United States intended and understood: the interpretation offered by the Tribes is consistent with both the United States' short-term goals and its long-term visions for the Washington Territory.

5. *Right of Tribes to Take Naturally-Occurring Clams from Underneath Staked or Cultivated Oyster Beds*

The Tribes argue that they also have the right to take 50% of the harvestable naturally occurring clams from the beds that exist underneath many artificial oyster beds. The intervenors, on the other hand, argue that these clam beds fall directly within the ambit of the Shellfish Proviso because the clam beds are

"shellfish," and the natural clams will be harvested from beds that are "staked or cultivated," even when using the Tribes' interpretation of the Shellfish Proviso.

Consistent with its interpretation of the other provisions of the Treaties, the Court relies on, inter alia, the historical context of the treaty, the principal that ambiguities must be resolved in the favor of the Indians, and the "reservation of rights" doctrine in order to decide whether clams from natural beds beneath artificial oyster beds may be harvested.

The Court finds that plaintiffs' evidence is more persuasive and demonstrates that, at treaty time, the exclusive rights gained by one who had staked or cultivated an (artificial) oyster bed did not extend to the natural clam beds found beneath. It apparently was a common practice for Indians and other citizens to harvest claims legally[25] from natural clam beds existing beneath artificial shellfish beds; thus it is likely that the Indians understood that this practice would continue, notwithstanding the existence of the Stevens Treaties.

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25 At or around treaty time, many state legislatures had passed laws that proscribed penalties for those entering upon artificial oyster beds and taking oysters; however, these states did not extend the penalty to clams. *See* An Act concerning Oyster, April 28, 1851 (Ca.); Act of 1847 ch. 86 14 (Va.). In fact, many state laws often protected the right of a citizen to take clams from beneath an artificial oyster bed. *See* Act of May 1844, § 4 (R.I.); An Act Regulating and Protecting the Planting of Oysters, June 23, 1855, § 10 (Conn.). Furthermore, the case law also supports this conclusion. *See Phipps v Maryland*, 22 Md. 380 (1864) (statutes regulating the planting of oysters did not diminish public's fishing rights); *Brown v DeGroff*, 14 A. 219 (N.J. 1888) (oyster cultivator may not bring suit against "clammers" who entered his oyster bed to collect subjacent clams); *State v. Taylor*, 27 N.J.L. 117 (N.J. 1858) (planted oysters may not interfere with public's fishing rights); *Fleet v Hegeman*, 14 Wend. 42 (N.Y. App. Div. 1835)(artificial oyster beds could be created and protected only if their creation did not interfere with the public's right to fish). The laws cited by the defendants as evidence that some states punished clammers for taking subjacent clams are not persuasive nor are they directly on point, as these laws punished trespass. Because taking subjacent clams from artificial oyster beds was considered to be a public right, such action was not an unlawful interference with another's person, property, or rights; hence the action was not a trespass. *See* An Act in Addition in Addition to an Act Entitled 'An Act for the Growing of Oysters,' June 13, 1845 (Conn.); An Act to Encourage and Protect the Planting of Oysters, August 15, 1849 (Me.); An Act to Encourage and Regulate the Planting of Oysters in the Township of Perth Amboy, Nov. 25, 1824, § 1 (N.J.).

III. THE "*SHIVELY* PRESUMPTION" AND THE EQUAL FOOTING DOCTRINE

The State of Washington and the intervenors urge the Court to construe the Stevens Treaties in light of the "Equal Footing Doctrine" and the "*Shively* presumption." Under the Equal Footing Doctrine, every new state is entitled to entrance into the Union free of any encumbrance on its land, so that it stands on "equal footing" with the other states. *Shively v. Bowlby*, 152 U.S. 1 (1894). The "*Shively* presumption" is an outgrowth of this doctrine, and holds that any pre-statehood grant of property does not include tidelands unless the grant clearly indicated that tidelands were included. *See United States v. Holt State Bank*, 270 U.S. 49 (1925).

In sum, their argument under the Equal Footing Doctrine is that any treaty right to harvest shellfish would amount to a property interest in the tidelands and since the treaty does not clearly specify an intent to grant a property interest in the tidelands, under the *Shively* presumption, the treaty cannot be construed as providing a right to harvest shellfish, or, alternatively, that the Shellfish Proviso must be broadly construed. For the reasons set out below, the Court rejects this argument and interprets the Stevens Treaties without regard to the Equal Footing Doctrine or the *Shively* presumption.

First, the Equal Footing Doctrine cannot be applied to rights reserved by the Tribes. It is clear that in *Holt State Bank* and *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court viewed the disputed fee title rights to lands underlying navigable waters as reserved by the United States before the subject treaty was made. Both cases frame the issue in terms of whether the United States "conveyed" or "disposed of" its fee title rights. *See Holt State Bank*, 270 U.S. 49, 57 (1925); *Montana v. United States*, 450 U.S. 544, 550-51 (1981). In *Holt State Bank*, the Court found "there was nothing in [the Treaties] which even approaches a grant of rights in lands underlying navigable waters." *Holt State Bank*, 270 U.S. at 58. In *Montana*, the Court held that the treaty "did not by its terms formally convey any land to the Indians at all." *Montana* ,450 U.S. at 553. Implicit in these conclusions is a finding that, prior to the respective Treaties, the United States held fee title to the beds of Mud Lake and the Big Horn River.

The reasoning in *Holt State Bank* and *Montana* is consistent with the concept of "aboriginal title" or "Indian title," first articulated by Chief Justice John Marshall in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). In *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), the Supreme Court explained "aboriginal title:"

> It very early became accepted doctrine in this Court that although *fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign* -- first the discovering European nation and later the original States and the United States -- a right of occupancy in the Indian tribes was nevertheless recognized.

Id. at 667. *See also Lac Courte Oreilles Band, Etc. v. Voigt*, 700 F.2d 341, 351 (7th Cir. 1983) (distinguishing between "treaty-recognized title," and right of permanent occupation, and "aboriginal title," which could be extinguished at any time by the United States). Thus, the Court in *Holt State Bank* and *Montana* properly viewed permanent fee title to the river and lake beds as held by the United States.

The paradigms of *Holt State Bank* and *Montana*, however, simply are not present in the case before this Court--the analysis in those cases, and their reliance on the *Shively* presumption, is inapplicable because, here, the Indians possess the disputed rights pre-treaty, and the treaty simply effects a reservation of rights. It is settled under *Washington II* that the fishing rights at issue in this case predated the Stevens Treaties, and the Treaties simply effected a reservation of those rights. See *Washington II*, 520 F.2 at 684. Similarly, the Supreme Court acknowledged the reservation in *Fishing Vessel*: "The fishing clause speaks of 'securing' certain fishing rights, a term the Court has previously exercised." *Fishing Vessel*, 443 U.S. at 678. Because the Stevens Treaties must be construed as a reservation of rights by the Tribes, not a granting of rights by the United States, the *Shively* presumption and the Equal Footing Doctrine cannot play a role in the evaluating the existence or scope of the rights.

In addition, the Supreme Court has applied the Equal Footing Doctrine in one context only, namely when evaluating a claim of right to lands beneath navigable waters based upon an alleged conveyance or retention of fee simple ownership by the

United States prior to statehood. *See Shively*, 152 U.S. at 2 (defendants were successors to "owners of a donation land claim, as laid out and recorded by [the predecessor in interest] under the act of congress . . . . commonly known as the 'Oregon Donation Act," embracing the then town and much of the present city of Astoria"); *Montana*, 450 U.. at 550-51 ("The question is whether the United States conveyed beneficial ownership of the riverbed to the Crow Tribe by the Treaties of 1851 or 1868"); *Holt State Bank*, 270 U.S. at 57 (adjudicating the question of "whether the lands under the lake were disposed of by the United States before Minnesota became a state"); *Utah Division of State Lands v. United States*, 482 U.S. 193, 204 (1987) (The United States answered in the District Court that title to the lakebed remained in federal ownership by selection of the lake as a reservoir site prior to Utah's statehood). The court has never applied the doctrine in the context of a claim of right based on an alleged pre-statehood reservation of fishing rights, and lower courts have followed the pattern of the Supreme Court.[26]

The case before this Court is a dispute that does not in any way involve ownership of tidelands. The Tribes do not claim ownership of tidelands today, nor is the Tribes' based upon an alleged pre-statehood conveyance of ownership of the tidelands. At stake in this case are shellfishing rights, and there is no Supreme Court or other authority that would justify application of the Equal Footing Doctrine in this context.

Finally, the Equal Footing Doctrine cannot form the Court's interpretation of the Treaties' language concerning the right to fish in general. The "right of taking fish" has been interpreted both Winans[27] and *Fishing Vessel* without incorporation of the Shively presumption. While it is true that Winans discusses the Equal Footing Doctrine, it does not discuss Shively in the context of interpreting the treaty. Rather, the discussion of the Equal Footing Doctrine in Winans is distinct from its interpretation of the treaty, and can be regarded as dicta addressing the "subsidiary contentions" of the defendants in that

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[26] All of the Ninth Circuit cases discussing the Equal Footing Doctrine involve claims to ownership of submerged lands. *See e.g., United States v. Pend Oreille Public Utility Dist No. 1*, 926 F.2d 1502, 1509 (9th Cir. 1991); United States v. Aam, 887 F.2d 190, 191 (9th Cir. 1989); *Puyallup Indian Tribe v Port of Tacoma*, 717 F.2d 1251, 1257 (9th Cir. 1983).

[27] *United States v. Winans*, 198 U.S. 371 (1905)(a treaty is a grant of rights from the Indians, not to the Indians).

case. Moreover, in *Fishing Vessel*, the Court makes no reference at all to the Equal Footing Doctrine.[28]

The State of Washington and the intervenors have not explained why this Court, unlike its predecessors, should, for the first time, incorporate the *Shively* presumption into its analysis of the Shellfish Proviso. This case is not the first, as the State of Washington and the intervenors argue, to implicate property rights. The Court in *Winans* upheld the Indians' right to cross private property to take fish. *Winans*, 198 U.S. at 381 ("[T]he Indians were given a right in the land--the right of crossing it to the river--the right to occupy it to the extent and for the purpose mentioned."). Furthermore, the right to take salmon and steelhead, upheld in *Washington II* and *Fishing Vessel*, includes the right to use private tidelands for beach seines, tidal impoundment traps, stake nets and reef nets. Nevertheless, the Equal Footing Doctrine was rejected by this Court in *Washington I* and ignored by the Supreme Court in *Fishing Vessel*. There is no reason why this Court should now take a different tack in interpreting the fishing clause.

In sum, the Court interprets the words of the Stevens Treaties in light of the specific principles of construction applicable to Indian Treaties and concludes that fishing rights are rights reserved by the Tribes and not granted to them. The Court construes both the Fishing Clause, in general, and the Shellfish Proviso, in particular, without regard to the Shively presumption.

IV. MODERATE LIVING DOCTRINE

Assuming that the Tribes' interpretation must prevail, the defendant and the intervenors argue that, in order to maintain a "moderate living," the Tribes do not need to exercise any treaty entitlement to the shellfish. The Tribes, however, argue that the evidence does not support any reduction in their tribal share.

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28 The decision below decisively rejected the *Shively* presumption as a relevant consideration:

> [a]dmission of the State of Washington into the Union upon an equal footing with the original states had no effect upon the treaty rights of the Plaintiff tribes. Such admission imposed upon the State, equally with other states, the obligation to observe and carry out the provisions of treaties of the United States.

U.S v Washington, 384 F.Supp. at 401.

A. Fishing Vessel and the Moderate Living Doctrine

The right to take fish "in common with" other citizens entitles the Tribes not only to equal access to the fish, but also to an allocation, or "fair share," of the harvestable fish runs.[29] The Supreme Court devised a formula by which a "fair share" of the available fish may be calculated, generally providing that the harvestable fish passing through the usual and accustomed places will first be equally divided.[30] Under the Moderate Living Doctrine, this equal amount, however, may be reduced if tribal needs could be satisfied by a lesser amount. The Supreme Court found that the 50% amount could be reduced if substantial changes in circumstances had occurred, such as if the Tribe has dwindled to only a few members, or if the Tribe had voluntarily abandoned its fisheries. *Fishing Vessel*, 443 U.S. at 685-87. Thus, in *Fishing Vessel*, the Supreme Court found that the 50% amount is the maximum, but not the minimum, that the Indians are to be allocated, namely the Tribes are to be allocated only that portion which will provide them a "moderate living." 443 U.S. at 685-86.

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[29] See *Washington I*, 384 F.Supp. at 343. "Harvestable fish are those which remain to be taken after deducting the number of fish required for conservation purposes.

[30] A presumptive 50-50 allocation arises from the analogy of "in common with" fishing rights to a quasi-cotenancy:

> The logic of the 50% ceiling is manifest. For an equal division--especially between parties who presumptively treated with each other as equals--is suggested, if not necessarily dictated, by the word "common" as it appears in the treaties. Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset, and Anglo-American common law has presumed that division when, as
> here, no other percentage is suggested by the language of the agreement or the surrounding circumstances.

443 U.S. at 686 n.27.

Ultimately, the Supreme Court grounded its 50% presumptive share on the Indians' likely understanding of the words "right of taking fish," contemporaneous treaty usages of the word "common," and interpretation of contemporaneous treaties with Britain, in which similar language was interpreted to give each signatory nation an "equal" and apportionable "share" of the share of the fish harvest from the treaty area. 443 U.S. at 677-78.

B. The Moderate Living Doctrine in this case

The Court finds that no persuasive evidence has been presented to the Court by the State and the intervenors showing that a substantial change in circumstances has occurred,[31] so that the Tribes could maintain a moderate living without the exercise of their fishing rights, or that the Tribes have voluntarily abandoned their fisheries. Therefore, the Court declines to apply the Moderate Living Doctrine to these facts.

The State of Washington and the intervenors' argued at trial that the Court should engage in an economic discussion about the income levels of the tribal members in order to prove that the circumstances of the Tribes have changed to such a degree so as to warrant a reduction in the Tribes' share of shellfish.

The State's and intervenors' expert, Dr. Thomas, however, admitted that "moderate living" is *not* a term of art used by economists. The defendants and intervenors, through the income driven analysis of their expert, seek to prove that the Tribes already derive income from a variety of sources; thus the Tribes do not require a 50% share of the shellfish in order to maintain their "moderate living." Dr. Thomas relied solely on what he called "tribal household income"[32] and compared it to a moderate living standard by reference to the Bureau of the Census income data for non-Indian households.

Dr. Thomas' argument is flawed because it relied only on income, namely it was a single-indicator analysis. A more appropriate analysis, such s the analysis of the Tribes' expert Dr. Meyer, focuses on a several relevant factors in order to determine if the circumstances of the Tribes have changed to such a degree so that a reduction in the tribal share of shellfish is warranted. The uncontroverted evidence presented at trial is that the Tribes lag significantly behind other residents of the State of *Washington I*n their overall standard of living. For example, approximately one

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31 In fact, in the Pre-Trial Order, admitted fact #1, of all parties, is that "no plaintiff tribe has dwindled to just a few members."

32 This amount was calculated by including household incomefrom Census data for all Indians, Eskimos, and Aleuts residing on the reservations o the plaintiff Tribes. Dr. Thomas then used Census income data for Indian households and added what he called "tribal collective income" to the tribal household income. He than compared his calculation of average tribal household income to his definition of moderate living.

in three Tribal members live below the poverty level; Indians in the State of Washington endure health circumstances characterized by the State as "very poor;" tribal members have per capita incomes that are less than one-half the per capita income of non-tribal residents of the State; and tribal members suffer from unemployment rates at least three times greater than that of all non-tribal residents of the State of Washington.

Therefore, the Court declines to apply the Moderate Living Doctrine to reduce the Tribes' share of harvestable fish on the basis that they already derive a sufficient income and standard of living from other sources.

V. AFFIRMATIVE DEFENSES

A. Time-Related Defenses: Laches, Waiver, Estoppel and Adverse Possession

As a last line of defense, the defendant and intervenors suggest that the Tribes have, in various ways, forfeited their shellfishing rights. It is clear, however, that the intervenors have no basis for asserting time-related defenses in this action. The Supreme Court and the Ninth Circuit have consistently held that time-related defenses such as latches, waiver, estoppel, and adverse possession are not available to defeat Indian treaty rights. *See Board of Comm'rs v. United States*, 308 U.S. 343, 350-51 (1939) ("[S]tate notions of latches and statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise." (citations omitted)); *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983) (defenses not available "even where the Indians have long acquiesced in use by others of affected lands or have purported to grant away their occupancy and use rights without federal authorization."); *Catawba Indian Tribe of South Carolina v. State of South Carolina*, 865 F.2d 1444 (9th Cir. 1989) ("Except where Congress provides otherwise, claims based on Indian title are not subject to state law defenses such as statutes of limitations, adverse possession or laches.")

Accordingly, this Court summarily adjudicated the non-viability of these defenses.

B. Extinguishment by Indian Claims Commission Payments

Intervenor UPOW argues that the claims of many of the plaintiff Tribes to fishing rights under the Stevens Treaties have

been extinguished by prior payments made to those Tribes pursuant to the Indian Claims Commission Act, 25 U.S.C. § 70 ("ICCA"). This argument has no merit.

It is true that the primary purpose of the ICCA was "'to dispose of the Indian claims problem with finality.'" *United States v. Pend Oreille Public Utility District No. 1*, 926 F.2d 1502, 1509 (9th Cir. 1991) (quoting *United States v. Dann*, 470 U.S. 39, 45 (1985)). However, the Indians have never had a claim against the United States for lost fishing rights, because the Indians expressly reserved their fishing rights in the Stevens Treaties. Instead, the claims resolved by the ICC were claims for compensation based on the unconscionable sum provided in the Treaties in exchange for the Indians cession of their lands.

UPOW's citation to *Western Shoshone National Council v. Molini*, 951 F.2d 200 (9th Cir. 1991) is inapposite. In *Molini*, the Claims Commission paid the Western Shoshone Tribe $26 million for "full title extinguishment." The Ninth Circuit found held the "full title extinguishment" was an "unqualified transfer of title" that "include[d] a transfer of hunting and fishing rights." *Id.* at 203. In this case, the Tribes expressly reserved their fishing rights in the Treaties. The taking away of fishing rights occurred not pursuant to the Treaties, but in derogation of the Treaties. The payments awarded by the Commission to the Tribes were in compensation for the cession of the residual portions of their aboriginal title under the Stevens Treaties. The Commission had no obligation to compensate for lost fishing rights, because the Stevens Treaties did not divest the Tribes of fishing rights.

VI. YAKAMA TREATY

The treaty with the Yakamas[33] contains no language similar to the shellfish proviso which is part of the other Stevens Treaties. If the Court were to interpret the Yakama treaty in a vacuum, it would be difficult to determine whether the treaty "right to take fish" encompassed shellfish. The existence of the Shellfish Proviso in the other Stevens Treaties leaves no doubt that fish encompasses shellfish in *those* Treaties. However, an equally compelling rationale, which applies to the Yakama treaty as well as the other Stevens Treaties, is that the "right of taking fish" is a reservation of pre-existing fishing rights, and those pre-existing rights include the right to take shellfish.

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[33] June 9, 1855 (12 Stat. 951).

The Yakama Treaty, however, cannot be construed in a vacuum; it must be analyzed in light of the other Stevens Treaties. The Court recognizes that the Yakamas, like the other Tribes, enjoy the benefit of the canons of construction favoring Indians and would not infer a limitation on the "right of taking fish" without compelling evidence. The timing of the Yakama treaty, the absence of a Shellfish Proviso, and the scant evidence of any shellfishing activity of the Yakama tribe at or before treaty time is compelling evidence that the Yakama's "right of taking fish" does not include shellfish.

First, based on the timing of the treaty and the absence of the Shellfish Proviso, it is clear that the United States did not intend that the Yakamas would reserve shellfishing rights. The treaty with the Yakamas was concluded after the other Stevens Treaties, and it is reasonably clear that the United States, had it contemplated Yakama shellfishing, would have wanted similarly to protect "staked or cultivated beds" from fishing by the Yakamas. Because the United States did not include a Shellfish Proviso, it is reasonable to conclude that the United States did not contemplate that the Yakamas were reserving the right to harvest shellfish.

Moreover, the evidence introduced at trial indicates that it is unlikely that the Yakamas, when they entered the treaty, expected that they were reserving the right to harvest shellfish. The Yakama tribe lived, not in the Puget Sound region, but rather in the eastern Washington plateau. When asked whether she had an opinion as to what were the Yakamas' usual and accustomed grounds and station in Western Washington, the Yakamas expert answered "No, I do not." The evidence indicates that any use individual Yakamas made of shellfish in Western Washington prior to the Treaties was based upon marriage into Puget Sound Tribes.

Therefore, the court finds that the Yakama Tribe did not reserve a right to harvest shellfish when it entered into the treaty with the United States.

VII. SUCCESSORSHIP OF THE UPPER SKAGIT TRIBE TO THE NUWHA'HA AND THE BSIGWIGWILTS

The Upper Skagit Tribe argues that, since it is the successor of the treaty bands of the Nuwha'ha and the Bsigwigwilts, it is also the successor of the rights held by the Nuwha'ha and the Bsigwigwilts with respect to the right to take

shellfish. The State of Washington alone contests the political successorship of the Upper Skagit Tribe to the Nuwha'ha and the Bsigwigwilts.

Whether or not a particular group of persons has descended from a treaty signatory and has maintained an organized tribal structure is a question of fact which a district court is competent to determine. *Washington II*, 520 F.2d at 693. Furthermore, once a group is found to be the successor in interest to a treaty signatory, that group's rights under the treaty may be "lost only by unequivocal action of Congress." *Id., quoting Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

A. Successorship of the Upper Skagit Tribe

1. Successors to the Bsigwigwilts.

The Court finds that the Bsigwigwilts Tribe was previously adjudicated as the predecessor of the Upper Skagit. Thus, the Upper Skagit have the right to take fish from the usual and accustomed places of the Bsigwigwilts.

Washington I referenced and incorporated the Indian Claims Commission proceeding which had been brought by the Upper Skagit to adjudicate the issue of their predecessors-in-interest. *See Washington I*, 384 F.Supp. at 379; 8 Ind. Cls. Comm'n 475, 476-77 (Ddt. No. 92, March 25, 1960). In that proceeding, the ICC found that ten groups, including the Bsigwigwilts, were the predecessors of the Upper Skagit. Although the spelling of the Bsigwigwilts was different in the Indian Claims Commission proceeding; this Court is satisfied with the uncontroverted expert testimony presented at trial which accounted for the variations in the modern spelling.[34]

2. Successors to the Nuwha'ha

The issue of the successorship of the Upper Skagit to the Nuwha'ha is somewhat more involved because the Nuwha'ha were not identified by the Indian Claims Commission proceeding and subsequently incorporated into *Washington I* as one of the predecessor groups of the Upper Skagit.

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[34] In the Indian Claims Commission proceeding, the Bsigwigwilts Tribe was referred to as the "Mee-see-qua-quilch."

As a preliminary matter, it is clear that the tribe or group asserting the successorship bears the burden of proof on this issue. *Lummi Indian Tribe*, 841 F.2d 317, 318 (9th Cir. 1988). Moreover, to acquire the rights of a treaty signatory tribe, a contemporary tribe must obtain "treaty tribe status." *United States v. Washington*, 641 F.2d 1368, 1370-71 (9th Cir. 1981). For the Upper Skagit to obtain such status, it must demonstrate that a percentage of its members have descended from a treaty signatory and that the Tribe has maintained an organized tribal structure, including some defining characteristic of the original tribe. *Id.* at 1372-73.

a. The Suquamish Test

The State of Washington argues that the Court should not apply the *United States v. Washington* test described above, but instead should apply the test set forth in *United States v. Suquamish Indian Tribe*, 901 F.2d 772 (9th Cir. 1990). In *Suquamish*, the Ninth Circuit held that for one signatory tribe to claim the rights of a second signatory tribe, the plaintiff must show both a consolidation or merger of the tribes and a demonstration that the tribes, together, maintained an organized tribal structure. *Id.* at 776.

The facts in this case, however, are clearly distinguishable from the *Suquamish* case. Specifically, the following differences exist: (1) at issue in *Suquamish* was the consolidation of two signatory tribes; here, no one has presented evidence that the Upper Skagit itself was a treaty signatory; (2) in *Suquamish*, the tribes were mobil, hence providing little interaction that would point to a merger; here the Nuwha'ha and other predecessor bands lived before, during, and after treaty time in the same and adjoining watersheds; and (3) in *Suquamish*, the tribes were hostile to each other; they had no interest in uniting and the United States continued to deal with each group as a separate tribe; here, the Nuwha'ha and the other bands were political allies and shared resources. Consequently, based on these differences, the Court finds the *Suquamish* test inapplicable to this action.

b. The Washington Test

Having found the Suquamish analysis to be inapplicable to these facts, the Court finds the Ninth Circuit's analysis in *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981), to be

the appropriate test. In that light, the evidence in this case clearly indicates that the Upper Skagit obtained treaty time status, in that it has demonstrated that the requisite percentage of its members have descended from a treaty signatory and that the it has maintained an organized tribal structure, which includes some defining characteristics of the original tribe.

Through the testimony in open Court as well as the reports submitted into evidence, the Upper Skagit demonstrated the necessary facts under the *Washington* test. First, the Upper Skagit have maintained an organized tribal structure: The Upper Skagit claim a membership of approximately 600 members, and they have a tribal council that is elected from the enrolled members of the Tribe. Second, a percentage of the members of the Upper Skagit have descended from the Nuwha'ha. Specifically, as many as 200 of the 600 current tribal members trace their direct ancestry back to the Nuwha'ha. In addition, many members of the current tribal leadership trace their heritage directly to the Nuwha'ha leadership. Indeed, four members of the present council can trace their heritage back to two of the Nuwha'ha treaty time leaders; furthermore, the present chairman of the Tribe is a direct descendant of Nuwha'ha members who were alive during treaty time. As a result, the Tribe has demonstrated that it is the successor to the Nuwha'ha, under the test set forth in *United States v. Washington*; thus the Upper Skagit have a viable claim to the treaty fishing rights of the Nuwha'ha, including the shellfishing rights, under the Stevens Treaties.

B. The Usual and Accustomed Areas of the Upper Skagit Tribe

Having concluded that the Upper Skagit has succeeded to the rights of the Nuwha'ha and the Bsigwigwilts, the Court must determine the usual and accustomed areas of these predecessors from which the Upper Skagit may now take fish.

1. Usual and Accustomed Areas of the Bsigwigwilts and Other predecessors previously determined in Washington I.

In *Washington I*, the Court made findings in regard to the usual and accustomed fishing grounds and stations running along the rivers. Thus, the Court need now adjudicate only the usual and accustomed marine areas of the predecessors of the Upper

Skagit, including the Bsigwigwilts, the Nookachamps, and the Sabelxu.[35]

The uncontroverted evidence presented at trial through oral testimony and written reports is that these predecessor groups, at and before treaty time, took fish, including shellfish, from the marine and fresh waters, tidelands, and bedlands adjacent and subjacent thereto of the areas along the Saratoga Passage on the east coast of Whidbey Island from Sneatlum Point in the vicinity of Penn Cove and Harrington's Lagoon to Holmes Harbor, and on Camano Island from Utsaladdy to what is now the vicinity of Camano Island State Park and Elger Bay. In addition, these predecessor groups of the Upper Skagit also fished at the following marine and tideland locations: Deception Pass, Similk Bay, and southward to and including Penn Cove and Utsaladdy. Because the Upper Skagit have succeeded to the interests of these predecessor groups, the Upper Skagit also have the right to take fish from these usual and accustomed grounds and stations.

2. Usual and Accustomed Ares of the Nuwha'ha

The uncontroverted testimony also indicated that the Nuwha'ha, at and before treaty time, took fish, including shellfish, from the marine and fresh waters, tidelands, and bedlands adjacent and subjacent thereto of the vicinity of Bayview on Padilla Bay to the vicinity of Blanchard on Samish Bay up to and including Chuckanut Bay. Thus, because the Upper Skagit have succeeded to the interests of the Nuwha'ha, the Upper Skagit also have the right to fish, including shellfish, from these usual and accustomed grounds and stations.

VIII. ORDER REGARDING IMPLEMENTATION

This opinion interprets the plaintiff Tribes' right to take shellfish under the Stevens Treaties in light of the Shellfish Proviso limiting such right to the taking of shellfish from beds not "staked or cultivated."

Because of the complex issues and competing concerns involved in the implementation of this decision, and because the

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[35] The Upper Skagit Tribe was determined to have succeeded to the interests of the Bsigwigwilts, as discussed in this opinion. The other Tribes, the Nookachamps and the Sabelxu, were determined to be the predecessors of the Upper Skagit in *Washington I*. That the Upper Skagit succeeds to the interests and rights of the Nookachamps and the Sabelxu has not been contested here.

Court desires to have the benefit of the parties' prior experience in *Washington I*, the Court defers the issue of injunctive relief or any plan of implementation until there has been input from the parties.

Accordingly, the Court orders the parties to submit a jointly agreed upon plan of implementation on or before January 31, 1995. To the extent that the parties cannot agree on any issue, each party shall submit a separate proposal on such issue, supported by factual or legal grounds. All issues should be included and proposals shall be specific. It is the hope of the Court that all issues can be resolved by the parties through good faith negotiations.

IT IS SO ORDERED.

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898 F. Supp. 1453

UNITED STATES of America, et al., Plaintiffs,
v.
STATE OF WASHINGTON, et al., Defendants.

No. CV 9213.

United States District Court,
W.D. Washington.

Aug. 28, 1995

[HEADNOTES OMITTED]

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Allan E. Olson, LaConner, Washington, for plaintiff Swinomish Indian Tribal Community.

Mason D. Morisset, Seattle, Washington, for plaintiff Tulalip Tribe.

Richard Davies, Quileute Natural Resources, LaPush, Washington, for plaintiff Quileute.

Nettie Alvarez, Richard Ralson, Seattle, Washington, for plaintiff Hoh.

Richard Reich, Taholah, Washington, for plaintiff Quinault Indian Nation.

Annette Klapstein, Tacoma, Washington, for plaintiff Puyallup Tribe.

Daniel A. Raas, Bellingham, Washington, for plaintiff Lummi Indian Tribe.

Robert L. Otsea, Auburn, Washington, for plaintiff Muckleshoot Indian Tribe.

John Arum, Richard Berley, Seattle, Washington, for plaintiff Makah Indian Tribe.

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Bill Tobin, Vashon, Washington, for plaintiff Nisqually Tribe.

Kevin R. Lyon, Olympia, Washington, for plaintiff Squaxin Island Tribe.

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Eric Richter, Seattle, Washington, Malcolm L. Edwards, Edward-Sieh, Seattle, Washington, for intervening defendants Carter and Adkins, et al.

Albert Gidari, James Rasband, Perkins Coie, Seattle, Washington, for defendant Puget Sound Shellfish Growers.

James J. Johnson, Olympia, Washington, for defendant UPOW.

Daniel W. Wyckoff, Olympia, Washington, for Inner Sound Crab Association.

ORDER RE: IMPLEMENTATION OF SHELLFISH PROVISO

RAFEEDIE, District Judge, Sitting by Assignment.

The Court conducted an evidentiary hearing to assist it in implementing its December 20, 1994, Memorandum Decision

and Order[1] interpreting the Shellfish Proviso of the Stevens Treaties; having read and considered all of the papers filed in this matter and argument of counsel, the Court HEREBY FINDS AND ORDERS as follows:

I. Introduction

The purpose of this Order is to provide a framework for the implementation of the Tribes' fishing rights under the Shellfish Proviso. It is clear that, under the Treaties as interpreted in the Boldt decision,[2] the Tribes have the absolute right to take fifty percent of the shellfish from natural beds in the Tribes' usual and accustomed grounds and stations. Although enforcing this right necessitates changes in the status quo on all the affected property, effectuating the Treaty shellfishing right presents a particularly difficult problem with respect to property owned or leased by commercial Shellfish Growers and Private Property Owners, as compared to that owned by the State of Washington.

The Shellfish Growers and Private Property Owners are, effectively, innocent purchasers who had no notice of the Tribes' Treaty fishing right when they acquired their property. Indeed, many of these Growers and Owners purchased their land at or before the turn of the century, and they reasonably believed the land to be free of encumbrances and servitudes. Their belief was reinforced by the Tribes' failure to formally assert the Treaty right until over 100 years after the Stevens Treaties were signed.[3] Consequently, it is incumbent upon this Court to use its equitable powers to effect a balance between the Tribes' Treaty shellfishing right and the Growers' and Owners' interest in the peaceful enjoyment and/or commercial development of their property.

There is ample authority for this Court to invoke its equitable powers in implementing a plan under which the Tribes may exercise their Treaty right. For example, in *Yankton Sioux*

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[1] *United States v. Washington*, 873 F.Supp. 1422 (W.D. Wash. 1994) [hereinafter *Washington* II].

[2] *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974) [hereinafter *Washington* I].

[3] The various Stevens Treaties were negotiated in the 1854 and 1855; the original action to enforce the Tribes' Treaty fishing right was commenced in 1970. *See id.* at 353-57.

Tribe of Indians v. United States, although not explicitly acknowledging that it sought an equitable result, the United States Supreme Court approved the payment of money damages to the Yankton Sioux Indians in lieu of restoring a 648-acre tract to the tribe. 272 U.S. 351, 357, 47 S.Ct. 142, 143, 71 L.Ed. 294 (1926). The tract, which the Court held belonged to the Indians in fee, had been "opened to settlement and large portions of [it were then] in the possession of innumerable innocent purchasers." Id. As a result, the Court concluded, it would have been "impossible to . . . restore the Indians to their former rights." *Id.* Clearly, however, it would have been literally possible to eject the settlers, although obviously the Court viewed that option as neither practical nor desirable, under the circumstances. Consequently, it appears that the Court engaged in a sub rosa balancing of hardships. More recently, in *South Carolina v. Catawba Indian Tribe, Inc.*, Justice Blackmun acknowledged that equitable considerations might have limited the remedies available had the plaintiff Tribe prevailed on its claim to 144,000 acres of land. 476 U.S. 498, 519 n.5, 106 S.Ct. 2039, 2050 n.5, 90 L.Ed.2d 490 (1986) (Blackmun, J., dissenting) (citing *Yankton*).[4]

Similarly, the Ninth Circuit has approved weighing equitable considerations in devising a remedy in an action to quiet title to a parcel of land in the daughters of a Nez Perce Indian. *See Brooks v. Nez Perce County, Idaho*, 670 F.2d 835 (9th Cir.1982). Noting that such considerations would not bar the claim to the land entirely, the *Brooks* court nonetheless concluded that "[l]ack of diligence by the government in exercising its role as trustee may be weighed by the district court in calculating damages" for several decades' loss of use of the land. *Id.* at 837.

In *United States v. Imperial Irrigation District*, 799 F.Supp. 1052 (S.D.Cal.1992), Chief Judge Keep relied on *Brooks* to award monetary damages to the plaintiff Indians, rather than restoring tribal land to them. The Indians had a fee interest in land that was flooded, by the United States, for the agricultural development of thousands of acres of land in Riverside and Imperial Counties. Judge Keep utilized equitable factors suggested by the Restatement of Torts to balance the hardships among the parties and concluded that a damage award

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[4] The *Catawba Tribe* Court held that the Tribe's claim was barred by the statute of limitations; hence, the majority did not reach the question of an appropriate remedy. 476 U.S. at 510-11, 106 S.Ct. at 2046.

was more appropriate than injunctive relief because "[a]n injunction would render useless thousands of acres of cultivated farmland to the detriment of innocent farmers who are blameless in this lawsuit and who have worked hard to cultivate desert lands." Id. at 1069.

Further support for the application of equitable principles in drafting an implementation order in this case is found in the Ninth Circuit's opinion affirming the Court's order in connection with the Tribes' anadromous fishing rights: "A cotenant dissatisfied with his partner's exploitation of their common property may seek a partition of the property in order to protect his interest in it. By analogy, the Indians are entitled to an *equitable* apportionment of the opportunity to fish in order to safeguard their federal treaty rights."[5] *United States v. Washington*, 520 F.2d 676, 687 (9th Cir.1975), cert. denied, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976) (emphasis added). It is the Court's view, therefore, that in the instant controversy, the Court has not only the authority, but the duty, to fashion an implementation plan in accordance with principles of equity.

II. Equitable Considerations

The Court is persuaded by Judge Keep's analogy to the tort of trespass, in Imperial Irrigation District, supra, and likewise applies in this case the factors suggested by the Restatement of Torts:[6]

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[5] The Supreme Court approved this analogy in *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 n.32, 99 S.Ct. 3055, 3076 n.32, 61 L.Ed.2d 823 (1979).

[6] The factors suggested by the Restatement to determine the appropriateness of injunctive relief against trespass are as follows:

(1) The nature of the interest to be protected;

(2) The relative adequacy of injunctive relief and other remedies available to the plaintiff;

(3) Any unreasonable delay of the plaintiff in initiating the action;

(4) Any related misconduct on the part of the plaintiff;

(5) The relative hardship of the parties if the injunction is granted or denied;

(6) The interests of third persons and the public; and

First, the relevant interest to be protected is the Tribes' Treaty shellfishing right, which is similar to a profit a prendre or a license--not a fee interest in land. Hence, the powerful historical legal protection of land ownership is not implicated in this case. Nonetheless, because it derives from the Treaties, the Tribes' right is entitled to significant protection.[7]

Second, although from a purely economic standpoint, monetary relief might be virtually interchangeable with injunctive relief, the evidence clearly indicates that the Tribes' shellfishing rights are not purely economic. Rather, the Tribes have historically fished for religious and ceremonial--as well as subsistence--purposes; thus, their right is not adequately vindicated by monetary relief. Moreover, the Tribes argued persuasively that intangible benefits will inure to their members from exercising the right to fish, such as the cultural value of participating in a traditional activity and the self-esteem of being gainfully employed. These benefits would be lost were the Court to substitute monetary relief for the right to fish.

Third, as previously noted, the Tribes waited over a century to institute formal action to enforce their Treaty right. Of course, the United States, as Trustee for the Tribes, also bears responsibility for the delay; however, as against innocent third parties--particularly the Shellfish Growers and Private Property Owners--the delay weighs against absolute injunctive relief.

As to the fourth factor--related misconduct by the plaintiff--there is no evidence of misconduct on the Tribes' part. Fault for creating this controversy lies squarely with the State of Washington and the United States, for selling the tidelands and not objecting to the sale, respectively.

Factors five and six--the relative hardships of the parties and the interests of the public and third parties--are in this case

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(7) The practicality of framing and enforcing the injunction.

Restatement (Second) of Torts § 936(1)(a)-(g).

[7] Unlike a contractually created license or profit, the Tribes' shellfishing right is the result of the negotiation between two sovereigns, the United States and the Tribes. As such, although Congress retains the power to abrogate the provisions of an Indian treaty, "Indian treaty rights are too fundamental to be easily cast aside." *United States v. Dion*, 476 U.S. 734, 739, 106 S.Ct. 2216, 2220, 90 L.Ed.2d 767 (1986).

somewhat related. As to the Tribes, denying the shellfishing right entirely would be a significant hardship. Allowing unfettered access to the Growers' and Owners' property, however, arguably creates a more significant hardship, given their reasonable expectation of quiet enjoyment and/or commercial development of their land. The hardship is particularly compelling with respect to the Growers, who have invested substantial resources in their commercial operations. The interests of the public are represented by the State of Washington, a party to this action, and the Court acknowledges the general interest of the public in the recreational use of the State's resources, including shellfishing. Moreover, the Court acknowledges that, by including the Shellfish Proviso in the Treaties, the negotiators of the Stevens Treaties sought to protect and aid the development of a shellfish industry, presumably to benefit the public generally. *See, e.g., Washington II*, 873 F.Supp. at 1437-38.

In light of these factors,[8] then, the Court believes that the Tribes' Treaty shellfishing right must be subjected to reasonable time, place and manner restrictions[9] when the right is exercised on the Growers'[10] or Owners' property. In finding that some affirmative right to fish on such private property must be enforced, the Court notes that there are less than 15,000 individual members of the party Tribes. Of these, many do not live on the various reservations and thus are not likely to participate in shellfishing activities. Similarly, in imposing restrictions on the right to fish on commercial and private property, the Court notes that the Growers own or lease only a small fraction of the relevant tidelands (approximately 9500 acres), and that the Tribes likely will not fish on many Owners'

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[8] The seventh factor, related to the practicality of formulating injunctive relief, is not at issue in this case: it clearly is feasible to frame and enforce injunctive relief.

[9] In discussing the modification of an injunction relating to the apportionment of certain Indian tribes' fishing rights in the Columbia River basin, the Ninth Circuit has noted that "[i]t is established that 'the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the state in the interest of conservation....'" *United States v. Oregon*, 657 F.2d 1009, 1016 (9th Cir.1982) (*quoting Puyallup Tribe v Department of Game of Wash.*, 391 U.S. 392, 398, 88 S.Ct. 1725, 1728, 20 L.Ed.2d 689 (1968)).

[10] In addition, as discussed *infra*, Section III.B., because of the difficulties in distinguishing artificial and natural beds on the Growers' property, the Court believes that it is also appropriate to refine the definitions of such beds as they are applicable to shellfish on the Growers' property.

property because it simply is not practical to do so, given the low concentration of shellfish. Thus, this balancing vindicates the Owners' and Growers' reasonable expectations without unnecessarily impinging on the Tribes' right to fish.

III. Additional Definitions

Before setting forth specific implementation procedures, it is necessary to resolve certain issues raised by the parties:

A. Whether artificial beds hereafter created by the State to enhance recreational activities for its citizens should be subject to a Treaty allocation

The Shellfish Proviso in the Stevens Treaties precludes Tribes from harvesting on "any beds staked or cultivated by citizens." The Court finds that the term "citizens," as used in the Treaties, includes the State of Washington, when the State acts on the behalf of the public.[11]

The testimony at the hearing on implementation indicated that when the State creates artificial beds, it does so for the benefit of all its citizens, many of whom visit state parks to participate in recreational shellfishing. Mr. Cleveland Pinnix, Director of Washington State Parks, testified that the attendance at the state parks has been increasing steadily for several years and that one of the reasons for the increase in attendance is the public's desire to engage in shellfishing activities. In addition, Mr. Pinnix testified that the Parks Department hoped to continue planting shellfish because "[w]e have a limited resource at state parks. We have a great deal of public interest. Our hope is to expand the recreation opportunities for other people of the state."

Based on the uncontradicted evidence presented by the State, it is clear that when the State fosters the growth of shellfish on state property, it acts on behalf of its individual

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[11] To the extent that the term "citizens" might be read to include only natural persons, as the Tribes argued, the Court also finds that equitable considerations warrant treating the State as a de facto citizen when it acts on behalf of its citizens. The five million residents of the State are blameless in this controversy, and the Court believes that the benefits and efficiencies of permitting the State to act on their behalf in growing the State's shellfish resource far outweigh any interest the Tribes have in limiting the artificial bed exclusion to natural persons.

citizens.[12] Accordingly, to the extent that the State hereafter creates artificial shellfish beds on public property, those beds shall be deemed "staked or cultivated by citizens" and thus excluded under the Shellfish Proviso from the Tribes' Treaty right. Members of the Tribes, however, shall have the same access to such beds as all other citizens. The Court is not persuaded *that United States v. Washington*, 759 F.2d 1353 (9th Cir.1985), compels a different result.

B. Further Refinement of the Definitions of Natural and Artificial Beds

1. Natural Shellfish Beds

In the Court's Memorandum Decision and Order, the Court held that natural beds could not be staked or cultivated by citizens. *See Washington II*, 873 F.Supp. at 1440. The Court did not, however, determine what minimum quantity of shellfish constitutes a bed--that is, for example, do two clams constitute a natural bed that cannot be staked or cultivated? Subject to the provisions, *infra* section III.B.2., regarding *existing* beds on Growers' property, the Court believes that clarification of the definition of a natural bed is necessary to enable the Tribes and the Growers to implement the Tribes' Treaty right while promoting the growth of the industry generally.

The evidence presented to the Court during both the May 1994 trial and the May 1995 implementation hearing suggests that the Court should further refine the definition of a natural shellfish bed so that it corresponds to the usage at treaty time, namely that a natural bed should be defined quantitatively. The Court, in its Memorandum Decision and Order, discussed at great length the influence of the East Coast shellfish industry on the treaty negotiators, noting that East Coast shellfish practices likely were representative of the common practices of both the industry generally and the West Coast shellfishing industry specifically. *See, e.g., Washington II*, 873 F.Supp. at 1431-34.

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[12] The Court believes that the circumstances presented in this case are analogous to a situation in which, under the doctrine of *parens patriae*, "'a state that is party to a suit involving a matter of sovereign interest is presumed to represent the interests of all its citizens.'" *Alaska Sport Fishing Assn. v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir.1994) (citation omitted). For a general discussion of the doctrine, *see Hawaii v Standard Oil Co. of Calif.*, 405 U.S. 251, 257-60, 92 S.Ct. 885, 888-90, 31 L.Ed.2d 184 (1972).

Specifically, the 1876 report of Lt. Paul DeBroca,[13] cited in the Court's opinion, defined a "natural bank" as a

> conglomeration of mollusca presenting a character of continuity.... The natural bank may be single or formed of several smaller banks, separated by greater or less spaces, but always sufficiently connected to be considered parts of one whole. *As to places where, through accidental circumstances, isolated oysters have developed, they are not classed among the natural beds, since, if this were the case, the largest part of the submarine soil of the coast would be under interdiction and oyster culture would be impossible.*

Id. at 1432 (citation omitted) (emphasis added). From that definition, it is clear that the industry placed no restrictions on planting or cultivation activities on naturally occurring beds comprised of only isolated oysters because such a restriction would unduly interfere with the industry's growth by precluding cultivation on "the largest part of the submarine soil."

Other evidence offered at the May 1994 trial supports this interpretation of a natural bed. Indeed, the evidence established that the shellfish industry considered a "natural bed" to be one that could support a commercial livelihood. The Court is not persuaded by the Tribes' arguments that a commercial or quantitative definition is inappropriate since they also fish for ceremonial or subsistence purposes. While the Court acknowledges that fact, the reasons that the Tribes fish are not relevant to the industry's definition of a natural bed at treaty time.[14]

Thus, in light of the practices and understandings in the shellfish industry that existed at treaty time, it is clear that a quantitative definition of a natural bed is appropriate. In order to preclude future disputes among the parties, the Court further defines a "natural shellfish bed" as follows: a natural shellfish bed is a bed which is capable of sustaining a yield of shellfish

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[13] Entitled "On the Oyster Industries of the United States." Plaintiff's Exhibit PL-237.

[14] The Court notes that during the May 1994 trial, the Tribes themselves argued that the Court should look to the shellfish practices and industry of the East and West Coasts in shaping its interpretation of the Treaties. The Tribes cannot rely on those practices selectively to advocate their position on some issues while ignoring the practices as to others.

that will support a commercial livelihood. Based on the evidence presented, it is clear that this quantity will vary by species. Evidence offered by the parties indicated that the minimum quantity for manila clams ranged from .5 pounds per square foot to 1.15 pounds (and higher) per square foot, and the Court finds that the minimum quantity that will support a "commercial livelihood" is at least .5 pounds of mature clams per square foot. The relevant quantities for other species shall be determined by the parties' agreement, or though the use of the dispute resolution procedures in the Implementation Plan.

This definition of a natural bed applies *only* in the context of determining what beds may be "staked or cultivated by citizens." It does not purport to limit the Tribes' right to take shellfish from natural beds which do not meet the relevant minimum quantity threshold.[15]

2. *Artificial Shellfish Beds*

The Shellfish Proviso exempts from the Tribes' Treaty right beds which are staked or cultivated. In its December 1994 Memorandum Decision and Order, this Court distinguished such so-called artificial beds from natural beds, from which the Tribes have the right to harvest shellfish, setting forth definitions of both types of beds. Faced with the practical difficulties, discussed below, in categorizing beds on the Growers' property, the Court finds the following refinement of the definition of artificial beds both necessary to effectuate an implementation plan and appropriate in light of equitable considerations *with respect to existing beds on property owned or leased by Growers licensed by the State of Washington.*

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[15] The Treaties reserved the right to take fish, including shellfish, from their usual and accustomed grounds and stations subject to the limitation that "they shall not take shellfish from any beds staked or cultivated by citizens." Treaty of Medicine Creek, December 26, 1854 (10 Stat. 1132); *see Washington II*, 873 F.Supp. at 1422 n. 3.

Accordingly, the right to take shellfish was not limited to natural beds but rather was exclusive of artificial beds. Consequently, the shellfish industry's working definition of a natural bed that could not be staked or cultivated is relevant only in that narrow context; it does not limit to the Tribes' right to take fish from *any* "non-artificial" bed.

The Court notes, however, that throughout this Order and at other times in this case, the Court and the parties have used the term natural beds to describe those non-artificial beds from which the Tribes have the right to take shellfish. Such use of that term does not imply a quantitative limit on the beds from which the Tribes may take shellfish.

The parties all agree that any shellfish beds created exclusively by the Growers' efforts--"by scratch," as it were--are not subject to tribal harvesting, as such beds are clearly "staked or cultivated" within the meaning of the Shellfish Proviso. There is less agreement among the parties, and less clarity under the Proviso, in connection with the remaining beds. At first blush, it might appear that determination of whether a bed is "natural" or "artificial" is an easily soluble--though heavily fact-driven-- inquiry. This, unfortunately, is not the case. The evidence presented suggests that a number of types of shellfish beds exist:[16] (1) those created by scratch (which are clearly artificial);[17] (2) those enhanced by the Growers' positive efforts, such as planting, netting or seeding pre-existing shellfish beds; (3) those enhanced by the Growers' preventative efforts, such as predator control or rototilling in or around pre-existing beds; (4) those beds whose existence is due to the Growers' efforts, albeit passively, such as the "natural" migration of shellfish from an artificial bed to a new spot; and (5) those beds whose existence is entirely due to the natural propagation of the species (clearly natural beds).

As discussed below, the Court finds that, *as to existing shellfish beds on the Growers' property*, only those beds in the fifth category are subject to the Tribes' Treaty right, and that the remaining categories of beds are "staked or cultivated" within the meaning of the Proviso. Specifically, the Court finds that the term "cultivated" encompasses the wide range of techniques used by the Growers to enhance production of shellfish on their property, including, but not limited to, the so-called positive, preventative and passive techniques described above.[18] Further, the Court finds that, even if shellfish begin to set naturally in an artificial or de facto artificial bed, such bed will retain its artificial character and thus remain exempt from tribal harvesting--that is, once a bed is determined to be artificial, it shall remain an artificial bed unless it is abandoned.

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16 The examples cited for each category are not meant to be exclusive; rather, they are illustrative of the Growers' efforts falling within each category.

17 For example, the Tribes conceded that beds where the *substrate* has been created artificially fall within this category, as do beds of shellfish not indigenous to the area (e.g., Pacific oysters outside the Hood Canal).

18 Beds created or enhanced through such techniques will hereinafter be referred to as "de facto artificial beds."

The Court believes that this categorization is appropriate because, based on the evidence adduced at the hearing,[19] it appears that it would be very difficult--if not impossible--to develop a "snapshot" of existing shellfish beds at the time commercial development commenced on the Growers' property. Further complicating the issue is the fact that shellfish beds are not static. Consequently, the Court simply does not, and cannot with any degree of certainty or precision, know what shellfish beds would exist had the Growers never commenced their farming activities, and any attempt to classify presently existing beds without such information would be speculation at best.

Also weighing in favor of a broader definition of "cultivated" with respect to the Growers' property is the fact that the Court does not believe that the Tribes should benefit from the Growers' efforts. Permitting the Tribes to harvest fifty percent of the shellfish from de facto artificial beds would confer a windfall on the Tribes,[20] and would neither protect nor encourage the growth of the shellfish industry.

Notwithstanding this broad definition of "staked or cultivated," however, no bed will be deemed artificial or de facto artificial merely because it lies on the Growers' property. There may be numerous beds on the Growers' property of which the origin is unknown; these may include beds whose existence is entirely due to the natural propagation of the species. Such beds are subject to tribal harvesting under the Treaties.

In sum, existing artificial and de facto artificial beds are excluded from the Tribes' Treaty right. As to beds which may hereafter develop or be created or enhanced, the status of such beds will be determined by reference to the definition of a natural bed, *see supra* section III.B.1., and the implementation procedures governing the creation of new artificial beds.[21]

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[19] Although the parties presented significant evidence on this issue, none of the evidence was particularly helpful to the Court.

[20] The magnitude of the windfall would be reduced as a result of the Tribes' concession that it would be appropriate to require them to pay the Growers fifty percent of the costs of enhancement in return for a fifty percent allocation of the enhanced shellfish take. The Court does not believe, however, that such a solution adequately balances the hardships between the Tribes and the Growers.

[21] Implementation Plan, § 6.3.

IV. The Implementation Plan

In formulating the following implementation procedures, the Court has considered several issues. As previously discussed, the Court has applied equitable principles to balance the hardships among the parties and has further refined definitions of certain words in the Shellfish Proviso in order to resolve certain practical problems involved with implementation. Although the implementation procedures adopted below are at times specific, the overall Plan is essentially general in nature to enable the parties to resolve their disputes without Court intervention. Finally, the Court notes that the rights of the Tribes, as set forth in this Order, are tribal rights, not individual rights; consequently, it is for the Tribes to determine how each tribal allocation shall be distributed.

In order to accomplish the implementation of the Court's Memorandum Decision and Order, the Court ADOPTS the following procedures [the following sections 1 through 9 shall be referred to as the "Implementation Plan" or the "Plan"]:

1. INTRODUCTION

1.1 Objectives of Plan.

The primary objective of this Implementation Plan is to provide a framework, principles, and course of action for effective cooperative management of the shellfish resources subject to Treaty harvest under the Court's decision of December 20, 1994. In effectuating the rights of the Tribes to take shellfish under the Treaties, this Order also recognizes the State's responsibilities for conservation of public shellfish resources, subject to the Treaty right to take fish at usual and accustomed places.

1.2 Goals and Procedures.

The Implementation Plan calls for interim and then long term management plans. The management plans are to provide both Treaty and non-Treaty shellfishers, subject to their respective regulatory authorities, the opportunity to harvest their respective shares in an orderly manner, consistent with resource protection. The Plan also provides specific procedures for tribal and non-tribal harvest on State and private lands and waters. To the extent specific procedures in section 6 (applicable to commercial Shellfish Growers) and 7 (applicable to Private Property Owners) conflict with general provisions of the Plan,

the relevant specific provisions apply to the Growers and Owners, respectively.

1.3 Application of Law.

All provisions of this Plan and all management plans that are developed from it must comply with the Court's December 20, 1994 decision. No part of this plan is intended to repeal any prior decision in *United States v. Washington*.

1.4 Requirement of Coordination Among Tribes.

The Tribes will be responsible for coordination with all affected Tribes in the development of management plans or compliance with the interim plan, below. This requirement, however, shall not relieve any party of the obligation to give any notice required herein to any affected party.

1.5 Tribes Bound.

The Tribes bound by this implementation plan are: Lummi, Nooksack, Upper Skagit, Swinomish, Tulalip, Muckleshoot, Suquamish, Puyallup, Nisqually, Squaxin Island, Skokomish, Port Gamble S'Klallam, Jamestown S'Klallam, Lower Elwha S'Klallam, Makah, Hoh, Stillaguamish, Sauk Suiattle and Quileute. Other Tribes may become signatories to this Plan by the agreement of all parties to the Plan or by order of the Court.

1.6 Shellfish Sanitation Consent Decree.

The Consent Decree Regarding Shellfish Sanitation Issues, entered by the Court on May 4, 1994, specifies those public health requirements to be applied to Treaty shellfishing activities and establishes an intergovernmental, cooperative system for monitoring, enforcement, and dispute resolution. This Implementation Plan, along with all management plans and agreements reached pursuant to it, shall be developed, applied and interpreted in a manner consistent with that Consent Decree.

1.7 Status of Headings.

The headings in this Implementation Plan are for the convenience of the reader and are not intended to change the substance of the Plan.

2. PRINCIPLES OF SHARING THE SHELLFISH RESOURCE.

2.1 Effective Date of Allocation; Mandating Equitable Adjustments.

The effective date of this Implementation Plan for purposes of calculating allocation of shellfish between tribal and nontribal harvest shall be the date of this Order, unless otherwise agreed between the State and Tribes. With respect to shellfish on the Growers' and Owners' property, the allocation between tribal and non-tribal harvest shall commence on the date a Tribe gives notice pursuant to Plan sections 6.1 and 7.1, respectively.

2.2 Cooperative Management.

Where data is not available to determine the total allowable harvest for purposes of allocation between the Tribes and State, the Tribes and State shall develop a cooperative approach to management with the goal of maximizing harvest and equalizing allocation, consistent with conservation of the resource. This shall apply for both interim and permanent management plans and agreements.

2.3 Sustainable Harvest Biomass.

"Sustainable harvest biomass" means the approximate portion of a shellfish resource that can be harvested from a shellfish population on an annual basis in perpetuity. It is analogous to the "sustained yield" or "harvestable surplus" that biologists, using sound and accepted management methods, determine can be harvested from a shellfish bed, or mobile shellfish population, while preserving the ability of the remaining shellfish population to maintain annual production of the sustainable harvest biomass in perpetuity. For certain species, such as crab and shrimp, the sustainable harvest biomass may be achieved by agreed restrictions on the size or sex taken, and/or quantity or location by limiting the type of gear used for the fishery, ensuring that a portion of the biomass remains unharvested.[22]

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[22] This definition corresponds with the relief provided for tribal harvest of anadromous fish: the court defined the harvestable number of fish in terms of that amount that would not impair the amount of fish needed to maintain the run at existing levels. *See generally Washington I*, 384 F.Supp. at 405-407, 409, 417.

2.4 Management Objectives.

"Management Objectives" means the objectives of each party to meet their respective goals using their share of the harvestable surplus of the resource and the biological goals for the continued long term health of the resource.

2.5 Sharing Provisions.

Each Tribe may take, from natural beds, up to fifty percent of the sustainable harvest biomass of any shellfish species within the usual and accustomed areas for that Tribe. The sharing shall be achieved by coordinated management plans. Such sharing shall be subject to the following provisions:

a. *Sharing Sustainable Harvest Biomass.* The sustainable harvest biomass of a shellfish bed or shellfish resource subject to the Treaty right shall be determined on an annualized basis or other agreed periodic basis. The sharing of shellfish shall take into account all commercial and non-commercial harvests from the sustainable biomass of shellfish. For intertidal areas, the sustainable harvest biomass shall be shared on a bed by bed basis,[23] or on other established boundaries of a public land[24] parcel for sharing the shellfish. Where the sustainable harvest biomass cannot be calculated for a species or area, the harvestable amount to be shared shall be determined using the best fishery management information and practices that ensure conservation and maintain production of shellfish in the area harvested.

b. *Adjusting Imbalances.* Unless otherwise agreed, all management plans adopted pursuant to this Implementation Plan shall include provisions for addressing imbalances in harvest where a party was not afforded the opportunity to attain its share. The means for addressing imbalances may vary

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This definition, however, is intended to apply to the order sharing shellfish harvests, not to change existing standards regarding the limited application of state laws to treaty Indians exercising treaty fishing rights.

23 Where a shellfish bed straddles publicly and privately owned land, the provisions of this section apply to the shellfish on public land only.

24 For purposes of this Implementation Plan, "public land(s)" means any land owned by the State, or any of its subdivisions or agencies, unless such land is being leased to a Shellfish Grower.

depending upon the species, the management techniques used for specific fisheries, and management imprecisions.

c. *Independent Management Discretion.* The State and affected Tribe(s) shall have discretion to decide their respective management objectives for the harvest of their respective shares, whether commercial, recreational, ceremonial, or subsistence use.

d. *Overlapping Usual And Accustomed Areas.* Where two or more Tribes have overlapping usual and accustomed areas, then the combination of tribal harvesting shall not exceed fifty percent of the sustainable harvest biomass, leaving at least fifty percent of the sustainable harvest biomass for non-Indian management.

e. *Intertribal Allocation.* Allocating the tribal share among affected Tribes shall be determined by the affected Tribes, with the intertribal agreement as appropriate provided to the State. Lack of an intertribal sharing agreement shall not entitle a combination of Tribes to take more than fifty percent of the sustainable harvest biomass of shellfish in a given area.

f. *Equal Opportunity.* In sharing the opportunity for harvest of a shellfish resource, the State and Tribe may also consider the time of fishing, quality of the shellfish, ease of harvesting, and catch per unit effort for the shellfish involved to ensure that there is equal sharing of the harvest opportunity.

g. *Polluted Shellfish And Shellfish Not Available.* In allocating the sustainable harvest biomass between the State and affected Tribe(s), shellfish beds that are not presently harvestable due to pollution, development, or other physical causes shall not be counted in the biomass of shellfish beds which can be harvested. This shall not prevent a relay harvest of polluted shellfish in accordance with the Consent Decree Regarding Shellfish Sanitation Issues. Any such relay harvest from a polluted shellfish bed shall be accounted for and allocated separately from sharing of shellfish beds that are approved under Consent Decree.

h. *Planted Oyster Beds.* Oysters planted on public lands, such as on certain State Parks, that would not exist but for the State having planted those oysters are not subject to a tribal share. The Treaties did not reserve any right to such artificial oyster beds.

i. *Beds Staked And Cultivated.* To the extent that any shellfish bed on public land is within the definition of "any beds staked or cultivated by citizens" in the Court's relief applicable to commercial Shellfish Growers, then such shellfish beds on public lands are not subject to tribal sharing.

Further, the provisions of section 6.3, related to the creation of new artificial beds, are applicable if the State proposes to create any new artificial beds on public land.

3. LONG-TERM AND INTERIM MANAGEMENT PLANS FOR THE SHARING OF SHELLFISH RESOURCES ON PUBLIC LANDS OR IN PUBLIC WATERS.

3.1 *Management Plans.*

Ultimately, tribal and non-tribal harvests of shellfish on public lands and from public waters[25] will take place pursuant to management plans.[26] Those management plans will be developed between the Tribes and State on a government-to-government basis. Once agreed by the parties to the plan, each such management plan shall be effective without further approval of the Court and shall have the same force and effect as this Order.[27]

3.2 *Harvests Included.*

All tribal harvests of shellfish by Tribes participating in this Implementation Plan, and all non-tribal harvests in areas included within the collective usual and accustomed grounds

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25 The relief provided in the above section applies to all shellfish species located *on or in* all public owned lands, (such as clams, oysters, geoduck clams, and mussels that are embedded in or attached to public owned lands), and to all mobile shellfish species that *live in* the waters of the State, (such as crab, shrimp, sea cucumber, sea urchin, squid, octopus, and others).

Separate provisions of the Implementation Plan define the State's role in tribal harvest of shellfish on private tidelands, or commercial Shellfish Grower lands.

26 As indicated in § 7, such interim and long-term management plans shall also contain provisions specifically applicable to harvest from non-commercial, privately owned tidelands.

27 To the extent the parties have already entered interim agreements, those agreements have the same status as future management plans or agreements under this Plan.

and stations of the Tribes participating in this Implementation Plan, will be subject to management plans adopted pursuant to this Implementation Plan.

3.3 *Interim Plan Needed.*

Because development of management plans is a long term process, an interim plan is needed to govern all shellfisheries pending adoption of permanent plans.

4. INTERIM PLAN FOR STATE AND TRIBAL HARVEST OF SHELLFISH ON PUBLIC LANDS OR FROM PUBLIC WATERS.

4.1 *Scope of Interim Plan.*

This interim plan shall govern shellfisheries from the date of entry of this Order until permanent or long term management plans are adopted for particular species of shellfish. The interim plan sets out procedures all persons and parties covered by this Implementation Plan shall follow until permanent or long term management plans are adopted.

4.2 *Closure of Commercial Shellfisheries.*

The State and Tribes shall close all commercial shellfisheries and prohibit the commercial landing of all shellfish on public lands or from public waters, within thirty days after entry of this Order, except where a signed interim agreement between the State and all affected Tribes is in place regarding a specific commercial shellfishery.

4.3 *Adjusting Non-commercial Fisheries.*

After entry of this Order, the State shall adjust non-commercial shellfisheries within forty-five days after any Tribe makes a written request to the Washington Department of Fish and Wildlife (WDFW) to do so, if necessary to ensure that no more than fifty percent of the harvestable amount will be taken by tribal or non-tribal fisheries, including commercial and non-commercial combined. A dispute over the necessity or extent of the adjustment to be made shall be subject to the dispute resolution procedure of sections 4.7 and 4.8.

4.4 *Shellfish Beds With Inadequate Data.*

For beaches where data is not available for determining the sustainable harvest biomass and allocation between the State and all affected Tribes, the affected Tribes and the State will:

a. manage the beach to allow for affected Tribes to take up to fifty percent of the jointly estimated shellfish harvest opportunity until more specific data is available.

b. jointly identify shellfish beds needing a survey and develop a prioritized list and time line to complete surveys and provide for more accurate management and sharing on these beaches, within efficient biological management.

4.5 *Opening A Fishery By Agreement.*

Where no interim agreement is in place thirty days after the entry of this Order, a shellfishery closed or adjusted pursuant to section 4.2 or 4.3 may only be opened or enlarged after compliance with the procedures in section 4.6. Shellfisheries may proceed at any time, however, if agreement is reached between the State and all affected Tribes, notwithstanding the procedures otherwise applicable under this section.

4.6 *Opening A Fishery Without Agreement.*

Where the State or a Tribe desires to open or enlarge a shellfishery that has been closed or adjusted pursuant to section 4.2 or 4.3, it shall comply with the following procedure (unless an interim agreement is in place):

a. Before proceeding, the State and all affected Tribes shall confer at least one time in an effort to reach agreement regarding the proposed fishery.

b. Failing agreement, the party (Tribe(s) or State) proposing to open the fishery shall provide to the other party a proposed regulation for the fishery, in writing, at least fourteen days before the fishery is scheduled to begin. The party proposing the harvest shall be able to provide a sound fisheries management basis for a determination that a harvestable surplus exists and that a fishery can be operated that will not interfere with the sharing principles ordered by this Court. However, this is not intended to shift the burdens, described below, associated with contesting a fishery. The regulation (or other documents

provided with the regulation) shall contain, at a minimum, the following information:

(1) The dates and hours the fishery will be open;

(2) The catch area(s) open for harvest;

(3) The type of fishery to be opened (commercial or non-commercial);

(4) The species to be taken, including an estimate of or upper limit on the amount to be taken and the basis of the estimate;

(5) The estimated effort;

(6) The gear to be allowed;

(7) Provisions for recordkeeping and harvest reporting, including a schedule to ensure a timely exchange of information; and

(8) Any other information necessary for a specific fishery (such as, for example, daily limits for non-commercial fisheries).

In addition, information regarding enforcement and monitoring plans for the fishery shall be available to the State or Tribes upon request.

4.7 *Contesting State or Tribal Regulations and Dispute Resolution.*

A Tribe or the State may object to a proposed regulation. The party objecting must state the objection in writing and serve it on the entity proposing the fishery not more than ten days after receipt of the regulation, and at least three working days before the fishery is scheduled to begin. The objection must be based on a well-founded assertion that the proposed regulation would result in:

(1) an overharvest on an allocation or conservation basis in violation of the standards set by the Court in *United States v. Washington*, or other conservation standards agreed to by the State and affected Tribes; or

(2) otherwise violate this Implementation Plan or other applicable orders of the Court. The objection must state the reasons for the objection, the data on which it is based, and any other pertinent information available to the objecting party.

4.8 *Dispute Resolution During Interim Plan.*

No contested fishery shall begin unless a decision is rendered by a Special Master to allow the fishery. To the extent necessary, the Special Master may order the State or affected Tribe to comply with the allocation and sharing principles described by this order. In addition, the following rules shall apply:

a. The objecting party shall arrange for a hearing to be held before a Special Master no more than ten working days from the date of service of the objection (see Dispute Resolution, section 9).

b. The Special Master shall render a decision no more than ten working days after the conclusion of the hearing. No fishery shall open until a decision is rendered by the Special Master.

c. Where an emergency exists, (for example, where the proponent's opportunity to fish may be lost by delay), the Special Master may change the above time limits if the party requesting a change in the time limits has acted in a diligent and timely manner.

4.9 *Obligation to Adjust Catch and Comply With Sharing Order.*

Where there is a shellfish harvest without agreement, the State or affected Tribe(s) shall either comply with this section as needed, or contest the regulation as provided above. When a Tribe authorizes the harvest of shellfish without agreement, then the State shall reduce or adjust State regulated harvests as necessary to allow for the proposed tribal harvest. State regulated harvests shall not take a tribal share of shellfish as defined by the sharing principles, above. Tribal or State fisheries opened under this subsection shall not exceed the tribal or State share authorized by this Court and shall be adjusted by the Special Master, if necessary, to comply with and not exceed the tribal or State share.

4.10 *Tribal Ceremonial Shellfish Harvests.*

Notwithstanding the provisions of section 4.2 through 4.9, a Tribe may open a fishery for unanticipated ceremonial purposes by emergency regulation for a specific time period and for a specific allowable harvest amount.

5. DEVELOPMENT OF PERMANENT PLANS TO GOVERN STATE AND TRIBAL HARVESTS OF SHELLFISH FROM PUBLIC LANDS OR PUBLIC WATERS.

5.1 *Order to Develop Plans.*

Long term management plans shall be developed separately for each species of shellfish (or groups of related species, such as all crab species) for which fisheries are to take place on public lands or from public waters. Those management plans may be divided into sub-plans for specific geographic regions, for types of fisheries (commercial, non-commercial; subtidal, intertidal; etc.), or on any other agreed basis. Each management plan shall govern both tribal and State shellfisheries. Unless otherwise agreed, each management plan shall be subject to comprehensive review and agreement by the State and Tribes every five years.

5.2 *Order to Share Information and Establish Planning Committees.*

The State and Tribes shall exchange all available information in either side's possession regarding the status of shellfish populations and fisheries taking place on those populations, in response to reasonable requests for the same, to assist in carrying out their management responsibilities.

5.3 *Joint Technical Working Committee.*

In addition, the State and Tribes shall establish a joint technical working committee to perform tasks, including the following:

a. Exchange and review new and existing information;

b. Establish assessment methodologies;

c. Identify and prioritize management needs;

d. Develop annual or other periodic management plans.

5.4 *Elements of permanent plans.*

In addition to complying with the allocation ordered by the Court or otherwise agreeing, certain basic elements should be included in all management plans between State and Tribe(s). Those elements include:

a. Definitions of relevant terms.

b. Procedures for identification of the location of shellfish resources.

c. Procedures for assessing and estimating shellfish populations and the sustainable harvest biomass.

d. Identification of geographic boundaries to be used for management and allocation of shellfish harvests (management or allocation "units"), including procedures for how and when boundaries can be modified once adopted.

e. Identification of management periods and the duration of management plans.

f. Procedures for establishing the amount to be harvested from each management area.

g. Procedures for establishing how allocations will be measured for each management or allocation unit. In intertidal areas, unless otherwise agreed or determined by the Court, harvest management shall afford both Treaty and non-Treaty harvesters the opportunity to harvest fifty percent of the harvestable shellfish resource on each public beach, or tideland parcel having established or agreed boundaries, so long as consistent with public health and conservation requirements.

h. Procedures for enacting pre-season and in-season regulations. These will include the amount of notice to be given be-fore a fishery begins and requirements for exchanges of information.

i. Provisions regarding the content of regulations. At a minimum, these will include identification of the management plan under which the regulation is issued, the

species to be harvested, the harvest areas, the purpose of the harvest, the gear to be used, the expected effort, the expected harvest, and the dates and times of opening and closing of the fisheries. Unless addressed in a Tribal Ordinance, the regulations will also identify the monitoring system to be used.

j. Provisions regarding law enforcement for Treaty and non-Treaty shellfishing.

k. Provisions for recordkeeping and harvest reporting shall include: commercial WDFW shellfish receiving tickets, Treaty Indian receiving tickets, agreed sport harvest estimates, and agreed Treaty Ceremonial and Subsistence estimates.

l. Provisions for identification of tribally authorized harvesters taking shellfish and tribal representatives engaged in surveys, population estimates, and other management activities, including tribal fish managers, as well as tribal enforcement personnel.

m. Provisions for modifications of management plans.

6. COMMERCIAL SHELLFISH GROWERS.

The parties are bound by the definitions prescribed by the Court in this Order, the December 20, 1994 Memorandum Decision and Order; and any other relevant order in *United States v. Washington.*

6.1. *Determination Of Location Of Beds.*

Determination of the location of artificial beds on property owned or controlled by a Grower is triggered by notice to the Grower of the Tribe's interest in commencing harvest.

6.1.1 Any Tribe interested in commencing harvest on property owned or controlled by a Grower shall provide notice to other affected Tribes and to the Grower. The notice shall specify the particular property owned or controlled by the Grower upon which harvest is to occur, and shall include the name, street and mailing addresses, and telephone number of a tribal representative. Upon receipt of this notice, the Grower shall then provide the requesting Tribe with the following: the location of all artificial beds on any property owned or controlled by the Grower; a list of the species of shellfish

currently harvested from the artificial beds and from which bed a particular species is harvested; and a description of the means used by the Grower to demarcate portions of the property for purposes of managing or keeping records of shellfishing activities.

In addition, the Grower shall provide the following information for each bed asserted to be artificial: all records showing seeding, graveling, transplanting or other activity relevant to determination of each asserted artificial bed's status as an artificial bed; and all other records or other information upon which the Grower relies to support the Grower's assertion that each bed is artificial. However, such information shall not be required where an artificial bed is presumed to exist because the bed consists of the following: (1) a species that is known not to reproduce naturally in that location, such as Pacific Oysters outside of Hood Canal or (2) shellfish cultivated by an off-bottom or equivalent method.

The Grower shall provide all the information required by this section to the Tribes in writing within sixty days of the receipt of any tribal request. At a Grower's request, the Tribe shall sign a nondisclosure agreement which will protect any sensitive information provided to the Tribes. The presentment and signing of any nondisclosure agreement shall not be construed as giving the Grower more time in which to provide the required information to the Tribe.

6.1.2 The Tribes shall review the data provided by the Grower(s). In addition, the Tribes shall be given the opportunity to inspect the artificial beds located on the land owned or controlled by the Growers. The Tribes shall give the Grower fourteen calendar days' notice prior to the proposed date of inspection. The inspection shall occur as noticed by the Tribes and shall take place at a reasonable time. The Grower may accompany the tribal representatives during the inspection.

6.1.3 If the parties agree that the Grower has accurately stated the nature, extent, and location of all artificial beds located on the property, the parties shall then determine the sustainable harvest biomass, as defined by this Plan in section 2.3, from the Grower's beds subject to a tribal share. The sustainable harvest biomass shall not include shellfish found in areas that are closed to shellfishing due to pollution. If the parties are unable to agree on the sustainable harvest biomass for a particular bed or group of beds, the matter shall be submitted to a Special Master.

6.1.4 If the parties agree on the nature, extent, and location of all artificial beds and the sustainable biomass from the beds subject to a tribal share, harvest shall commence according to the provisions specified below. Harvest shall also commence to the extent that there is agreement as to any bed or group of beds, meaning that the parties need not be in full agreement as to the location of all artificial beds and as to the sustainable biomass of all beds subject to a Treaty share prior to beginning any harvest. To the extent of any disagreement which the parties are unable to work out themselves, the parties shall submit the issue to a Special Master. The burden of proof shall be with the party asserting that a particular bed is an artificial bed.

6.1.5 *Times When The Tribes May Give Notice Under Section 6.1.1.*

Tribes initially have one year after the date of this Implementation Plan to give notice pursuant to section 6.1.1 to Growers subject to the Implementation Plan. After that year, a Grower may operate free of additional notices or tribal claims for a three-year period. At the end of the three years, the Tribes shall have a ninety-day period during which they may provide notice pursuant to section 6.1.1. At the end of that ninety-day period, the Grower shall again have a three-year period free from additional tribal notices or claims. The ninety-day open period for giving notice under section 6.1.1 shall continue to alternate thereafter with a three-year period during which such notice may not be given.

6.2 *Harvest Plans.*

Not later than thirty days after a final determination has been made of the location and of all artificial beds, whether by agreement or through dispute resolution, the Tribe shall provide the Grower with a written statement describing its plan for sharing the harvest of shellfish outside the artificial beds including the general times of the proposed harvests.

The Grower shall then review the Tribe's proposal to determine if it is compatible with the Grower's farming operation. If the Grower determines that the Tribe's submitted plan is not compatible with his or her particular farming operation, the Grower may modify or revise the tribal plan accordingly. The Grower shall have the final word on how a tribal harvest will be conducted.

Any harvest plan, whether one drafted by the Tribe or by the Grower shall contain, at minimum, the following time, place, and manner restrictions on tribal access and harvest in order to protect the Grower's farming operation: (1) the time for a tribal harvest; (2) the species of shellfish and the location from which they will be harvested; (3) the number of tribal harvesters that can safely be present on a bed to conduct a harvest; (4) the appropriate method of access that will avoid damage to the Grower's crops; (5) the method of harvest, e.g., blanket or spot digging.

Although any tribal harvest will be done according to the requirements set forth by a particular Grower, the Growers are expected to act in good faith and to not impose any more restrictions on a Tribe than are necessary to protect the Grower's farm. In addition, the Grower may not so restrict the Tribe as to deny the Tribe the right to its tribal share. With respect to any harvest plan drafted by a Grower, the affected Tribe(s) may take the plan to a Special Master only if the plan prevents the Tribe(s) from taking the tribal share.

If, during any harvest, the Tribe takes shellfish from beyond the agreed upon boundaries or causes any damage to the Grower's property, the parties shall attempt to resolve the matter informally. If there is no resolution, the parties shall submit the matter to a Special Master; the Special Master can award appropriate damages or impose some other remedy.

No Grower may, instead of providing a Tribe the opportunity to harvest, insist that the Tribe take a money payment or take shellfish harvested by the Grower, as the tribal right is a right to take the shellfish by a tribal harvest. Nothing in this Plan, however, shall be interpreted to foreclose the parties from voluntarily negotiating such an agreement; the Grower simply may not force such an agreement on any Tribe.

6.3 *Creation Of New Artificial Beds.*

Nothing in this Plan shall be construed to limit a Grower's ability to create a new artificial bed. If a Grower plans to create a new artificial bed, the Grower shall give written notice to the affected Tribe(s) of his or her intention. The notice shall be provided at least forty-five days prior to the proposed creation of the bed and shall include the following: the location and species of the proposed bed. In addition, the notice shall

explain the basis for the Grower's belief that there is no natural bed in the location where the artificial bed is planned.

If a Tribe contests the Grower's conclusion that there is no natural bed in the location of the proposed artificial bed, the Tribe shall so notify the Grower within fifteen days of receiving the notice. The Tribe shall explain the basis for its position. In addition, the Tribe shall be given the opportunity to inspect the location of the proposed bed upon seven days' notice to the Grower. The inspection shall then occur as noticed by the Tribe at a reasonable time. The Grower may have a representative accompany the Tribe during the inspection.

If the parties are not able to resolve the matter, it shall be submitted to a Special Master. The party asserting that the area proposed for the new artificial bed is not a natural bed shall have the burden of proof. The Grower, pending the resolution of the matter by the Special Master, will be permitted to continue with any cultivation activities at his or her own risk: that is, the Grower may proceed with his or her plans at the risk that the Special Master could hold that the proposed area contains a natural bed which may not be staked or cultivated under the Treaties.

6.4 *Harvest of clams subjacent to artificial oysters.*

Because a Grower's oyster crops are at greatest hazard when clams are harvested from underneath the oyster crop, any agreement to harvest the natural clams subjacent to artificially grown oysters shall schedule the time for the tribal harvest between the commercial Grower's harvest of the oysters and replanting of oyster seed. The Tribe shall make itself available to harvest the clams within as small a timeframe as forty-eight hours from the harvest of the oysters by the Grower.

In those cases where the Grower himself or herself does not harvest the underlying clams in order to protect a fragile oyster crop, however, the Grower need not allow tribal harvest of the underlying clams.

6.5 *No General Regulation of Grower's activities.*

Nothing in this Plan shall be interpreted as interfering in any way with the right of a Grower to engage in predator control activities or in any other activities designed to manage or benefit the Grower's land. Moreover, nothing in this Plan shall constitute a limit on a Grower's right to redesign his or her

tidelands, even if such redesign results in the destruction of a natural bed (e.g., constructing a dike for Olympia Oysters which causes the substrate to change and eliminates a clam bed).

7. PRIVATE PROPERTY NOT USED FOR COMMERCIAL SHELLFISH GROWING.

Determination of the location of shellfish populations, population estimates, and regulations governing the harvest of shellfish from privately owned tidelands not being used for commercial shellfish production shall be subject to both interim and permanent management plans adopted by the Tribes and the State. Included within those plans, however, shall be additional measures applicable to harvests from privately owned tidelands, as described below.

7.1 *Population Surveys And Population Estimates.*

Tribes shall survey privately owned tidelands to determine the existence of shellfish populations prior to commencing harvest on a particular tideland.

The Tribes' surveys and population estimates shall be made consistent with the following rules, unless otherwise agreed between a Tribe and a Property Owner:

7.1.1 A survey to determine whether shellfish are present shall occur on each privately owned beach no more than once every three years. The cost of the survey is to be paid for by the Tribe. The manner and method of any survey must be of the type currently in use by the State of Washington.

7.1.2 An on-site population estimate shall occur no more than once per year. The cost of any estimate shall be paid by the Tribe.

7.1.3 Shellfish population information and data regarding a privately owned beach shall be shared with WDFW and the Property Owner.

7.1.4 Surveys and population estimates shall be done at reasonable times during daylight hours whenever feasible. Night surveys shall occur only when necessary.

7.1.5 Notice of a survey or population estimate shall be provided to the Property Owner no less than one month in advance of the survey or estimate. The notice shall include the

name, street and mailing addresses, and telephone number of a tribal representative responsible for the administration of the survey or population estimate.

7.1.6 Notice shall be provided by certified mail, fax, or personal service. The Tribes may chose the type of service. The Private Property Owner shall provide the address or phone number to the Tribe where that Owner will accept service of the notice. If such information is not provided by the Private Property Owner to the Tribe, notice need only be by publication.

In addition, survey schedules will be made available on a telephone hotline operated by the Tribe, if the Tribe has the means to provide such a hotline.

7.1.7 The Property Owner and the State may have representatives present during the survey and population estimate.

7.1.8 The Tribes need not conduct a comprehensive survey or population assessment of all properties potentially subject to tribal harvesting before being permitted to exercise Treaty harvest rights. However, as to a particular property, a survey or population assessment must be done prior to any tribal harvest.

7.1.9 Nothing in this Plan shall prevent a Private Property Owner from conducting his or her own survey or population assessment. The Private Property Owner may then, if the results of such a survey or estimate differs from the results of the tribal survey or estimate, contact the Tribes in writing and inform them of any discrepancy. If the parties are unable to resolve the matter, it shall be submitted to the Special Master according to the procedure set forth in this Plan.

7.2 *Tribal Harvest.*

In addition to the rules governing tribal harvests that are contained in management plans developed with the State, tribal harvests from private tidelands shall also be governed by the following requirements:

7.2.1 A tribal regulation opening private property for shellfish harvesting shall take into consideration the density of shellfish present and the size of the area to be harvested and limit the number of persons who may harvest accordingly.

7.2.2 The regulation opening private property for shellfish harvesting shall provide for monitoring and enforcement of the harvest. The regulation shall also ensure that proper sanitation procedures will be followed by all tribal harvesters.

7.2.3 The regulation opening private property for shellfish harvesting shall indicate the quantity of shellfish that may be taken, limits that apply to individual harvesters, if any, the purpose of the harvest (commercial, subsistence, ceremonial, or a combination), and the dates and times when harvest may take place.

Harvests may occur at night only if necessary. All harvests of properties less than 200 feet in width shall be limited to five days per calendar year. If a property is 200 feet or wider along the beach front, the number shall be increased by one additional harvest day per calendar year for every additional fifty feet of property.

7.2.4 There shall be no upland access to the private tidelands. The Tribes may access the private tidelands by water, across public lands, or by public rights of way only. Nothing in this Plan, however, shall prevent a Private Property Owner from voluntarily agreeing to upland access, although no Tribe has a right to insist on such access from the Tideland Owner.

7.2.5 Notice of a tribal harvest on private property shall be provided to the Property Owner and WDFW no less than one month in advance of the harvest. The notice shall include the name, street and mailing addresses, and telephone number of a tribal representative responsible for the administration of the harvest.

7.2.6 Notice shall be provided by certified mail, fax, or personal service. The Tribes shall chose the method of service. The Private Property Owner shall provide the address or phone number at which such notice will be received. If no address is provided, notice may be by publication.

7.2.7 If during any harvest, the Tribe damages the property of a Tideland Owner or in any way fails to harvest as stated in the notice provided to the Owner, the Owner may submit the issue to the Special Master as set forth in this Plan.

7.3 *Dispute Resolution.*

A Private Property Owner may challenge a proposed tribal harvest of shellfish from their property through the dispute resolution procedure of section 9 by complying with the following requirements:

7.3.1 An objection to a proposed tribal harvest must be made in writing to the Tribe's fishery department, stating the nature of the objection, the reasons for the objection, any data upon which the objection is based, and identifying any documents upon which the objection is based.

7.3.2 An objection must be based on a claim that the Tribe's plan for harvest is not consistent with the Court's orders in this case, an applicable management plan developed pursuant to this Implementation Plan, or other applicable law.

7.3.3 An objection to a proposed tribal harvest must be received by the Tribe not less than five working days before the harvest is scheduled to begin.

7.3.4 If the Property Owner posts a bond in the amount of $10 per lineal feet of waterfront of the property at issue, the Tribe may not harvest pending the outcome of the dispute resolution.

7.3.5 The Special Master shall have discretion as to whether a decision will be made based upon the written submissions of the parties or after a live hearing.

7.4 *Rights of Private Property Owners*

Nothing in this Plan shall be interpreted to limit in any way the rights of a Private Property Owner to build docks or other structures on their property.

8. MISCELLANEOUS PROVISIONS.

8.1 *Proposals To Establish New Artificial Shellfish Beds.*

8.1.1 The State shall exercise powers granted under State law regarding permits needed for shellfish enhancement (shellfish transfer permit, import permit, Hydraulic Project Approval). A person seeking to plant shellfish seed, place gravel or other substances, or otherwise enhance natural

shellfish populations through additions to the natural environment in or beneath state waters, shall comply with these requirements. When an application is received to undertake such an activity, the authorizing Department shall within five working days notify the Tribes by mailing a copy of the application to each affected Tribe's fishery department.

8.1.2 Before granting such a permit application, the appropriate State Department may ascertain the status of existing shellfish populations, if any, where the activity is proposed to occur, to determine whether a natural shellfish bed exists. Where a Department of the State performs the assessment of existing shellfish populations, the Department shall establish procedures whereby the Tribes shall be afforded the opportunity to participate in the assessment of the status of the existing shellfish populations. Where the State chooses not to perform the assessment, the Tribes may perform an assessment.

8.1.3 Whenever the State proposes to grant a permit under section 8.1.1, it shall notify the Tribes at least twenty working days before issuance of a permit. The State shall maintain copies of all documents that establish the basis for the granting of the permit and make them freely available to the Tribes at any Tribe's request. A decision to issue a permit, and the State's conclusion, if any, regarding the presence of a natural shellfish bed, may be challenged by a Tribe and is subject to the dispute resolution procedure if agreement is not otherwise reached.

8.1.4 Any person to whom a permit is issued to enhance shellfish production for commercial purposes shall be subject to any applicable provisions of this plan and the Court's orders to the extent of tribal Treaty rights.

8.2 *Proposals To Lease Tidelands Or Bedlands For Purposes Of Commercial Shellfish Growing.*

The purpose of this section is to address state leasing of tidelands and bedlands for shellfish harvest and production and to insure any Treaty right to harvest shellfish from such leased premises is addressed prior to leasing. Public lands under lease shall be considered the same as property owned by the lessee during any lease, and are subject to this court's provisions for private property or Growers' property. The following additional provisions apply for all new or renewal leases for shellfish harvest or cultivation.

8.2.1 *State Notice to Tribes.*

Whenever the State proposes to lease tidelands or bedlands for purposes of a commercial shellfish operation, then the State shall give affected Tribes notice of the lease application and be provided a date certain when the Tribes can communicate to the State regarding the assertion of a Treaty harvesting right to shellfish on the property, in accordance with this section. Notice to the affected Tribes shall include a description of the use to be authorized by the lease. The State shall evaluate the land to be leased to determine whether a natural shellfish population exists. The Tribes shall be afforded the opportunity to participate in the State's assessment of whether a natural shellfish population exists on the land. The results of any state evaluation shall be communicated to the Tribes at least thirty calendar days before a lease is issued. The underlying data and documents shall be made available to the Tribes.

8.2.2 *Tribal Assertion of Treaty Right on Leased Land.*

If an affected Tribe(s) contends that there is a natural shellfish population subject to Treaty harvest by the Tribe on property to be leased, the affected Tribe may notify the Washington Department of Natural Resources (DNR) in writing at least ten days before the proposed date of leasing. The notice shall describe the shellfish to which the Tribe asserts a Treaty right, the basis for that information, and the area and shellfish involved. Upon timely receipt of such notice, DNR shall not lease the property until compliance with paragraph 8.2.3. or 8.2.4, below. If a Tribe does not provide notice under this paragraph to DNR after DNR has complied with paragraph 8.2.1, then the Tribe shall not take shellfish from the leased property for the initial term of that lease, or ten years, whichever is shorter.

8.2.3 *State and Tribal Agreement.*

If a Tribe has provided notice under paragraph 8.2.2, the State and Tribe and/or prospective lessee may agree to a plan where the Tribe's Treaty right to take shellfish from the land to be leased is addressed before issuance of the lease. Any such agreement in writing shall be binding on the State, Tribe, and other persons who enter it for the term of the agreement.

8.2.4 *Dispute Resolution.*

Absent an agreement between the State and/or proposed lessee for tribal harvest from the bed to be leased, a Tribe or the State may seek dispute resolution. The dispute shall be heard by the Special Master pursuant to section 9, and the lease shall not be issued until the dispute resolution procedure has been completed. At such dispute resolution, the Special Master shall determine whether or not the leased activity authorizes the taking of shellfish subject to Treaty harvest. If the lease does not, then the lease may be issued. If the land to be leased contains shellfish subject to Treaty harvest, then the Special Master shall determine the tribal harvest of a Treaty share of such shellfish, or allow the State and Tribe to reconsider agreement regarding tribal harvest.

8.2.5 *State Renewals.*

Whenever the State proposes to renew a lease of tidelands or bedlands for purposes of a commercial shellfish operation, if the presence or absence of natural shellfish populations has not previously been completed, the procedures of part 8.2.1 shall be followed as if a new lease is being proposed. If an affected Tribe has previously not objected to leasing of the property after notice pursuant to Section 8.2.1, then the State need only provide such Tribe notice of its intent to lease or renew lease. If the lease only allows the lessee to grow and harvest a species known not to reproduce naturally in the lease location (such as Pacific Oyster beds outside areas of Hood Canal), or to grow and harvest shellfish cultivated by an off-bottom or equivalent method and there has been no natural shellfish population identified on the site during past leases, then the State may satisfy paragraph 8.2.1 by informing the affected Tribe of the nature of the proposed lessee use. The Tribe, however, may inspect such property or assert a claim under 8.2.2, if there is a natural shellfish population subject to a Treaty harvest.

9. DISPUTE RESOLUTION.

Except where otherwise agreed or stated herein, the following dispute resolution procedure shall govern all disputes arising from the implementation of this Plan.

9.1 *Selection Of A Special Master.*

The parties shall designate persons ["designees"] to serve as Special Masters. One person shall be designated by each of the following: [a] the Tribes; [b] the State of Washington; [c] the Shellfish Growers; and [d] the Private Property Owners. In the event a designee becomes unable or unwilling to continue service, the party that designated that individual shall designate a replacement within thirty days of the termination of the prior designee's service. Any party may change its designee upon thirty days' notice to the other parties. Such changes in designees need not be approved by the Court.

The four designated persons shall serve as a panel of Special Masters for purposes of this dispute resolution procedure; however, a single Special Master will hear and determine each dispute referred to the panel. A random drawing will be used to select the Special Master from the panel for each dispute.

9.2 *Procedure For Hearings Before A Special Master.*

The Special Masters will establish the procedures to be used in hearing disputes; those procedures may be informal, but shall include the following, except where specified otherwise in this implementation plan:

9.2.1 An opportunity for all parties to a dispute to present their evidence and arguments in writing and orally.

9.2.2 An opportunity for all parties to a dispute to respond to or challenge the evidence and arguments presented by other parties.

9.2.3 The opportunity for all parties to the dispute to compel the production of persons or documents from other parties that are necessary for full consideration of the matter in dispute.

9.2.4 In addition to considering evidence presented by experts called by a party to the dispute, the Special Master may consult with persons with technical expertise as necessary to the resolution of disputes. The persons consulted shall not be associated with the Tribes, any agency of the State of Washington (other than academic institutions) or any other person affected by the outcome of the dispute, absent agreement

of all parties to the dispute. Advice received from a technical expert shall be shared with all parties to the dispute.

9.2.5 The Special Master shall issue a written opinion stating the decision and the reasons for the decision within ten working days of the conclusion of the hearing or the submission of evidence by the parties to the dispute, whichever is later, unless agreed otherwise by the parties and the Special Master. In fashioning resolution to a dispute, a Special Master shall have no authority to eliminate the Treaty fishing rights of an entire Tribe. The Special Master may, however, order that the Tribe pay damages or may implement some other appropriate remedy.

9.2.6 In all cases the Special Master shall assess his or her costs of the hearing against the parties to the hearing in equal amounts except where the Special Master finds that the position of one or more parties was not substantially justified by facts or law, in which case the Special Master shall assess such party or parties all of the costs.

9.2.7 The Special Master shall not be required to hear or consider disputes in the order in which they are presented. The Special Master shall consider a dispute on an emergency or expedited basis when a delay would make the dispute moot due to the closure of a fishing season or other equivalent circumstance.

V. Order

In connection with the execution of the Implementation Plan, the Court HEREBY ORDERS as follows:

1. That the parties enter into management agreements as may be necessary to comply with this Order and execute the Plan.

2. That parties comply with the terms of this Order and comply with all management plans adopted pursuant to this Order, to the extent applicable to that party.

3. That the Defendant State of Washington and its Agencies and Departments, including their officers, agents, and employees are HEREBY ENJOINED from:

a. arresting or prosecuting members of plaintiff Tribes for harvesting shellfish at the usual and accustomed places of his or her Tribe, when the Tribe has allowed the

shellfish harvest in accordance with the provisions of the Court's Implementation Plan; and

b. applying or enforcing state statutes or regulations to regulate, limit, or restrict the exercise of Treaty fishing rights, unless such are fully consistent with the Court's decisions and Orders.

4. *Provided, however*, that this injunction shall not modify or alter any provision of the Shellfish Sanitation Consent Decree entered by the Court on April 21, 1994.

5. That on or before September 29, 1995, the parties in this case designate persons to serve as the original panel of Special Masters for the resolution of any disputes, pursuant to Section 9 of the Plan.

6. That judgment be entered in this action consistent with this Order and the Court's December 20, 1994 Memorandum Decision and Order.

IT IS SO ORDERED

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

909 F. Supp. 787

UNITED STATES of America, Plaintiff,

v.

STATE OF WASHINGTON, Defendant.

No. 9213.

United States District Court,
W.D. Washington.

Dec. 18, 1995.

United States and 16 Indian tribes sought declaratory and injunctive relief concerning off-reservation treaty right shellfishing. The District Court, 898 F.Supp. 1453, approved order implementing rights under Shellfish Proviso of Stevens Treaties. United States and tribes moved to amend order. The District Court, Rafeedie, J., sitting by designation, granted motion as to selection process of special masters, denial of tribal access across private land, and provision permitting assessment of damages against tribe, and denied motion as to minimum density figure of manila clams and as to definition of cultivated shellfish beds.

So ordered.

[HEADNOTES OMITTED]

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MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO ALTER OR AMEND THE JUDGMENT

RAFEEDIE, District Judge.

Introduction

The Court issued an Order on August 28, 1995, *United States v. Washington*, 898 F.Supp. 1453 (W.D.Wash.1995), implementing its interpretation of the Stevens Treaties between a number of Indian tribes and the State of Washington.[1] Pursuant to Fed.R.Civ.P. 59, the United States and the Tribes have moved to amend or alter the Order on five grounds: (1) the selection process of Special Masters is flawed; (2) the denial of Tribal access across private land is in conflict with Supreme Court authority; (3) the minimum density figure of manila clams is in error; (4) the definition of "cultivated" shellfish beds is too broad; and (5) the provision allowing the imposition of damages against the Tribes is legally erroneous.

For the reasons that follow, the Court HEREBY GRANTS the motion as to the selection process of the Special Masters, the denial of Tribal access across private land, and the

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[1] The Court's interpretation of the Treaties is set forth in the memorandum opinion *in United States v. Washington*, 873 F.Supp. 1422 (W.D.Wash.1994).

damages provision, and HEREBY DENIES the motion as to the minimum density figure of manila clams and as to the definition of cultivated shellfish beds.

Standard for Altering or Amending Judgments

A motion to alter or amend a judgment is made pursuant to Fed.R.Civ.P. 59(e). The grounds for reconsideration of a judgment are: "if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School District No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993), *cert. denied*, --- U.S. ----, 114 S.Ct. 2742, 129 L.Ed.2d 861 (1994).

In this case, the moving parties do not argue that there is newly discovered evidence or that there has been an intervening change in controlling law. Thus, the Court need only consider whether the challenged aspects of its Implementation Order involve clear error or are manifestly unjust.

Discussion

I. Special Master Selection Provision

Dispute resolution is governed by § 9 of the Implementation Order. Each of the following groups is entitled to designate one Special Master: the Tribes; the State of Washington; the Shellfish Growers; and the Private Property Owners. Any group may change its designation upon thirty (30) days' notice. § 9.1.

The four Special Masters serve as a panel for disputes; however, in a dispute, one Master is selected randomly to hear the dispute.

1. Challenges to the Provision

The United States and the Tribes argue that § 9 of the Implementation Order presents three problems. First, they argue that the pool of four Masters is tilted three to one against the Tribes, and therefore in any dispute they are three times less

likely to have a Master biased in their favor selected than one who is biased against them.

Second, the moving parties argue that § 9 violates Fed.R.Civ.P. 53--which governs the designation of Special Masters--because Rule 53 contemplates that the Court will select the Master, whereas § 9 allows the parties to do so.

Finally, the United States and the Tribe argue that § 9 is unconstitutional because it violates the Tribes' due process rights by having their disputes resolved in front of biased decisionmakers, particularly since there is no provision for judicial review of the Master's decision.

2. Analysis

a. Three to One Bias

Although the moving parties present a superficially compelling argument that the pool of Special Master is biased against them at three to one odds, their analysis is exaggerated. Assuming that the parties all designate Special Masters who are biased in favor of the designators--a bias that has yet to be shown[2]--the odds are not three to one that the Indians will draw an adverse Master.

Instead, the proper analysis is to consider the possible disputes that will arise. Each of the other parties is adverse to the Tribes, but not necessarily aligned with the others. Consider, for example, a dispute between the Tribes and the Private Property Owners. The only Masters selected by interested parties are the ones designated by the Tribes and the Owners. Thus, there is a 50 percent chance that the dispute will be heard by a Master selected by a party with no interest in the dispute (the State and the Shellfish Growers). There is a 25 percent chance that the Master selected will be that designated by the Tribes and a 25 percent chance that the Master selected will be that designated by the Owners--equal odds.

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[2] Whether the selection process as currently formulated in the Implementation Order leads to the selection of biased Special Masters is a different question that may not be entirely ripe for presentation.

Indeed, to adopt the United States' proposal of allowing the Tribes to designate three Masters (out of six) in the pool would actually tilt the odds in favor of the Tribes. Under this proposal, the Tribes would have a 50 percent chance of having one of their Masters resolve any dispute, while the defendant party would have only a 16 2/3 percent chance of having its Master selected. Only 33 1/2 percent of the time would the dispute be resolved by a Master selected by a noninterested party. The United States' proposal is obviously inferior to the Court's current scheme.

b. Rule 53

Rule 53(a), which governs the appointment of Special Masters, states in relevant part as follows: "The court in which any action is pending may appoint a special master therein."

There is little practical difference between § 9 of the Order and a system whereby the parties nominate Masters to be selected by the Court.

It appears that what troubles the United States the most is that the Order provides no guidance for what sort of qualifications are necessary or even desired in the Masters. Also troubling the United States is the provision that Masters can be "undesignated" by the designating party without Court approval.

c. Due Process

Finally, the parties cite a number of cases for the proposition that decisionmakers must be unbiased and impartial. *Schweiker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665, 1669-70, 72 L.Ed.2d 1 (1982); *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973).

The Ninth Circuit has not addressed this issue since 1962, when in *United States v. Lewis*, 308 F.2d 453 (9th Cir.1962), it held that disqualification of land commissioners were within the discretion of the district court unless "actual bias has been demonstrated beyond reasonable possibility of disagreement." *Id.* at 457. *Lewis* recognized that: "Those qualified to act as commissioners in a particular area are likely

to have had prior association with those qualified as expert witnesses from that area."

In light of the language of Fed.R.Civ.P. 53 and cases such as *Morgan v. Kerrigan*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935, 96 S.Ct. 2648, 2649, 49 L.Ed.2d 386 (1976); *Rios v. Enterprise Ass'n Steamfitters Local 638*, 860 F.2d 1168 (2d Cir.1988), which all involved district court selection of Special Masters, the Court will amend § 9 of the Implementation Order.

II. Access Across Privately Owned Lands

In the 1994 Decision, the Court rejected application of the *Shively* presumption to the Stevens Treaty. The *Shively* presumption "holds that any pre-statehood grant of property does not include tidelands unless the grant clearly indicated that tidelands were included." *Washington*, 873 F.Supp. at 1443. The Court noted that in previous cases, the Supreme Court had declined to apply the Shively presumption to Indian treaties. *Id.* at 1444 (citing *United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 678-80, 99 S.Ct. 3055, 3070-71, 61 L.Ed.2d 823 (1979) (*Fishing Vessel*)). The Court did not hold specifically that the Indian tribes had a right of access across private property, but the rejection of the *Shively* presumption suggested that the right existed.

In the Interim Order, the Court, having been presented with evidence, held that the Indian tribes had no right of access across privately owned tidelands, *unless* they specifically requested permission from the landowner or an Order from the Court. Interim Order, at 2.

Finally, in the Implementation Order, the Court foreclosed all access across private land: "There shall be no upland access to the private tidelands. The Tribes may access the private tidelands by water, across public lands, or by public rights of way only. Nothing in this Plan, however, shall prevent a Private Property Owner from voluntarily agreeing to upland access, although no Tribe has a right to insist on such access

from the Tideland Owner." *Washington*, 898 F.Supp. at 1473, at § 7.2.4.

The Court denied Tribal access across private property for two reasons. First, the evidence at trial showed that the Tribes had reached the tidelands by boat and not by land access. Second, the Court took into account equitable considerations and balanced the Tribes' right to fish against minimizing the intrusion on private property. The Court's ruling sought to avoid the conflict that would be generated by allowing the Tribes to cross privately owned property.

Nevertheless, the Court believes that, upon proper showing of the need for land access, the Tribes would be entitled under Winans to cross private property in order to exercise their fishing rights. Resolving the issue of Tribal access across private property requires the balancing of competing interests, and the Court emphasizes that land access is not to be granted unless there is a proper showing of the need for such.

The Court will modify its Order so as to allow land access to be an issue brought before a Special Master.

III. Minimum Density of Manila Clams

In the Implementation Order, the Court held that "a natural shellfish bed is a bed which is capable of sustaining a yield of shellfish that will support a commercial livelihood." For manila clams, the Court considered the evidence presented at trial and concluded that minimum density was 0.5 pounds per square foot. The Court used the low end of the figures, as there was evidence at trial indicating that the minimum density might be as high as 1.15 pounds per square foot. *Washington*, 898 F.Supp. at 1461.

The Court did not determine the minimum densities for other types of shellfish, leaving that issue for the parties to agree on by consent or to resolve through the Order's dispute resolution mechanism.

The Tribes argue that the Court's ruling concerning the minimum density of clams for commercial harvest is not supported by the evidence, because there is deposition testimony

to the effect that the minimum density might actually be as low as 0.25 or even 0.125 pounds per square foot. (E.g., Depositions of Duane Fagergren, William J. Taylor, David McMillin). The Tribes claim that the data submitted to the Court overinflated the minimum density, because it is based on the density of all clams, rather than mature clams only.

The moving parties do not claim to have newly discovered evidence, nor do they claim that there has been a change in the intervening law or legal error. The Tribes had an opportunity to present counter-evidence and opted not to do so. Based on the record before it, the Court cannot say that the 0.5 pounds per square foot figure will result in manifest unjustness.

Accordingly, the Court DENIES the motion to amend that portion of the Order.

IV. Definition of "Cultivated" Bed

The Court's Implementation Order defines "staked or cultivated" shellfish beds to include all beds that are developed aggressively or passively by the Growers--in other words, artificial beds. Once a bed is determined to be artificial, it retains its artificial character. The significance of this determination is that these artificial beds are exempt from Tribal harvesting. *Washington*, 898 F.Supp. at 1462.

One factor that led the Court to adopt such a broad definition of "cultivated" beds was that "the Court [could not] with any degree of certainty or precision, know what shellfish beds would exist had the Growers never commenced their farming activities." *Id.* A second factor was that the Court did not believe that "the Tribes should benefit from the Grower's efforts." *Id.*

The Tribes complain that this aspect of the Implementation Order is unfair because it restricts them from too much of the Puget Sound shellfish beds. They claim that the Court can determine the state of beds prior to cultivation by the Growers by examining the clam bed surveys conducted by the State of Washington prior to the leases to the Growers.

Since the Tribes are not presenting the Court with new evidence, their only legal basis for altering or amending the judgment is manifest injustice. However, the Tribes have not made any such demonstration in their papers. The entire basis of their claim is that it is possible to determine the pre-cultivation densities.

However, the Court has already considered this argument and rejected it, as stated explicitly in the Implementation Order. The Tribes have not presented sufficient evidence to show that this ruling creates manifest injustice.

Accordingly, the Court DENIES the motion to amend that portion of the Order.

V. Damages Provision

Finally, the Tribes argue that the provision of the Order granting Special Masters the authority to award damages against Tribes violates their sovereign immunity and is thus manifest error in law.

Indian tribes have a broad grant of sovereign immunity--indeed, as broad as that of the United States. *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991); *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir.1982) (en banc). Tribes cannot be sued without their unequivocal consent. *Potawatomi*, 498 U.S. at 509, 111 S.Ct. at 909.[3]

In *Potawatomi*, the issue was whether an Indian tribe that brought suit, seeking injunctive relief against Oklahoma's proposed tax assessment on cigarette sales by the tribe, had waived its sovereign immunity to past taxes owed. The Supreme Court held that the district court properly held that Oklahoma could require the tribe to collect sales taxes on sales to non-Indians in the future, but could not collect such past taxes owed. In other words, the Supreme Court held that by bringing a claim for injunctive relief, the tribe had waived its sovereign

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[3] However, individual tribal members are not protected by tribal sovereign immunity. *Potawatomi*, 498 U.S. at 514, 111 S.Ct. at 911-12 (citing *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)).

immunity to injunctive relief against it, but not monetary awards for past conduct.

The State of Washington relies on *United States v. Oregon*, 657 F.2d 1009 (9th Cir.1981), to argue for an opposite result. Aside from the fact that *Oregon* is an older case and a level below the Supreme Court, *Oregon* does not stand for the proposition that intervention in a suit by an Indian tribe waives the tribe's sovereign immunity to damages. In *Oregon*, the issue was whether the intervention by the Yakima tribe as a plaintiff in a suit to enforce fishing rights under treaty opened the tribe up to injunctive relief against it. The Ninth Circuit held that the tribe had assumed the risk that its position would not be accepted, and it was bound by the adverse order. *Id.* at 1015. However, *Oregon* does not hold that intervention in a suit for injunctive relief leaves the tribe open to damage awards against it.

Accordingly, the Court amends that portion of the judgment authorizing Special Masters to assess damages against Tribes.

Conclusion

The Court's Implementation Order of August 28, 1995, is HEREBY AMENDED to be superseded in the following relevant parts:

> 7.2.4 No land access to the privately owned tidelands will be permitted. All tribal access must be by boat, public road, or public right-of-way. Thus, Tribal members shall have no right to go upon or cross private property inland of the high water line, unless such access is specifically requested from and granted by a Special Master pursuant to the dispute resolution mechanism set forth in § 9 of this Implementation Order. The Special Master shall not grant access across private property unless the Tribal members can demonstrate the absence of access by boat, public road, or public right-of-way.

. . . . . .

9.1 Selection of a Special Master

The parties shall designate persons ["designees"] to serve as Special Masters. One person shall be designated by each of the following: [a] the Tribes; [b] the State of Washington; [c] the Shellfish Growers; and [d] the Private Property Owners. The four designated persons shall serve as a panel of Special Masters for purposes of this dispute resolution procedure; however, a single Special Master will hear and determine each dispute referred to the panel. The Clerk of the Court shall conduct a random drawing to select the Special Master from the panel for each dispute.

9.1.1 In designating its designee, each group is to provide the name, address, phone number, qualifications, and relevant previous employment and activities to the Court and to the other parties.

9.1.2 No designee shall become a Special Master unless approved by the Court. In the event a designee becomes unable or unwilling to continue service, the party that designated that individual shall designate a replacement within thirty days of the termination of the prior designee's service. Any party may change its designee upon thirty days' notice to the other parties.

9.1.3 Any party may challenge a designee before the Court has approved that person as a Special Master or after having brought a matter for dispute resolution but prior to the selection of a Special Master. The challenge shall be by motion to the Court, and may be on an expedited schedule if the party applies for permission. Challenges shall be made only for actual bias on the part of the Special Master.

. . .

9.2.5 The Special Master shall issue a written report and recommendation stating the decision and the reasons for the decision within ten working days of the

conclusion of the hearing or the submission of evidence by the parties to the dispute, whichever is later, unless agreed otherwise by the parties and the Special Master. In fashioning resolution to a dispute, a Special Master shall have no authority to eliminate the Treaty fishing rights of an entire Tribe or to impose damages against a Tribe. The Special Master may, however, implement some other appropriate injunctive remedy and may assess damages against individual Tribal members who damage private property during the exercise of fishing rights.

. . . . .

9.2.8 The Special Master's report and recommendation shall resolve the dispute when approved and adopted by the Court.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by telefax or by United States mail, copies of this Order on counsel for the parties in this matter.

Enabling Act, 25 Stat. 676, 679

AN ACT to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

. . . .

SEC. 8. That the constitutional convention which may assemble in South Dakota shall provide by ordinance for resubmitting the Sioux Falls constitution of eighteen hundred and eight-five, after having amended the same as provided in section five of this act, to the people of South Dakota for ratification or rejection at an election to be held therein on the first Tuesday in October, eighteen hundred and eighty-nine; but if said constitutional convention is authorized and required to form a new constitution for South Dakota it shall provide for submitting the same in like manner to the people of South Dakota for ratification or rejection at an election to be held in said proposed State on the said first Tuesday in October. And the constitutional conventions which may assemble in North Dakota, Montana, and Washington shall provide in like manner for submitting the constitutions formed by them to the people of said proposed States, respectively, for ratification or rejection at elections to be held in said proposed States on the said first Tuesday in October. At the elections provided for in this section

the qualified voters of said proposed States shall vote directly for or against the proposed constitutions, and for or against any articles or propositions separately submitted. The returns of said elections shall be made to the secretary of each of said Territories, who with the governor and chief-justice thereof, or any two of them, shall canvass the same; and if a majority of the legal votes cast shall be for the constitution the governor shall certify the result to the President of the United States, together with a statement of the votes cast thereon and upon separate articles or propositions, and a copy of said constitution, articles, propositions, and ordinances. And if the constitutions and governments of said proposed States are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed States which have adopted constitutions and formed State governments as herein provided shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States from and after the date of said proclamation.

Article XV
HARBORS AND TIDE WATERS

§ 1 HARBOR LINE COMMISSION AND RESTRAINT ON DISPOSITION. The legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof on either side. Any harbor line so located or established may thereafter be changed, relocated or reestablished by the commission pursuant to such provision as may be made therefor by the legislature. The state shall never give, sell or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high water, and within not less than fifty feet nor more than two thousand feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce.

§ 2 LEASING AND MAINTENANCE OF WHARVES, DOCKS, ETC. The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks and other structures, upon the areas mentioned in section one of this article, but no lease shall be made for any term longer than thirty years, or the legislature may provide by general laws for the building and maintaining upon such area wharves, docks, and other structures.

§ 3 EXTENSION OF STREETS OVER TIDE LANDS. Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided.

Article XVII
TIDE LANDS

§ 1 DECLARATION OF STATE OWNERSHIP. The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: *Provided*, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

§ 2 DISCLAIMER OF CERTAIN LANDS. The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States: *Provided*, the same is not impeached for fraud.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	No. CV 9213 Subproceeding No. 89-3 ORDER DENYING SUMMARY JUDGMENT RE: CERTAIN SPECIES AND DEEP-WATER HARVEST

TO ALL COUNSEL OF RECORD:

The Court has read and considered the papers supporting and opposing the State of Washington's motion for partial summary judgment regarding certain species and deep-water harvest. The Court finds that the two theories advanced by the State of Washington are inconsistent with a proper interpretation of the Stevens Treaty. Accordingly, these theories are rejected, and partial summary judgment is DENIED.

INTRODUCTION

The State of Washington ("Washington") has moved for partial summary judgment to establish that the right of the tribes to harvest shellfish is limited to exclude:

(1) Species that were not harvested at or before treaty time, such as shrimp, scallops, squid or abalone

(2) Shellfish harvested in deep-water areas where no harvesting occurred at or before treaty time, such as sea cucumbers, sea urchins, octopus, goeduck and crab.

Standard for Summary Judgment

Fed. R. Civ. P. 56(c) provides that summary judgment will be granted if the moving party can establish that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." British Airways Board v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978). It is the moving party's burden to inform the Court of the basis for its belief there are no genuine issues of material fact and this may be demonstrated by pointing out an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Principles of Treaty Interpretation

According to United States v. Choctaw Nation, 179 U.S. 291, 306 (1900), the intentions of the parties to the treaty will control the treaty's interpretation. In determining the intentions, a Court should look to "the words used – the words being interpreted, not literally nor loosely, but according to their ordinary signification. If the words be clear and explicit, leaving no room for doubt what the parties intended, they must be interpreted according to their natural and ordinary significance." Id. (emphasis added).

Therefore, under the familiar cannon [sic] of statutory construction, the starting point for interpreting a statute (in this case a treaty) is the language of the statute itself and "absent a clearly expressed legislative intention to the contrary, . . . [treaty] language must ordinarily be regarded as conclusive." Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); See also Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 180 (1982) ("Clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent of expectations of its signatories").

Special canons of construction are applied to determine the meaning of Indian treaties. These canons provide that any ambiguities in language must be resolved in favor of the Indians, that the language should not be construed to the prejudice of the Indians, and that technical meanings should be avoided in favor of the understanding of the Indians. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 675-676 (1979); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 528 (1832); Winters v. United States, 207 U.S. 564, 577 (1908); U.S. v. Winans, 198 U.S. 371 (1905). Finally, the Supreme Court stated in United States v. Winans, 198 U.S. 371, 381 (1905) that Indian treaties should not be viewed as grants or rights to the Indians, but as grants of rights from the Indians to the United States. Any rights which were not granted by the

Indians to the United States were reserved by the Indians because the Indians already possessed them.

Washington Theory Number One: Species Limitation

Washington begins with a factual assertion that the Tribes did not harvest certain species of shellfish, such as shrimp and scallops ("named species"), at or before treaty time. On that basis, Washington argues that the Stevens Treaty covers only species of fish harvested at or before treaty time, and that the Tribes therefore have no treaty right respecting the named species.

The starting point in evaluating this theory is the treaty language itself:

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

The Court has already held that shellfish are fish. Since the named species are shellfish, they are fish as well, and are covered by the treaty. There is no language in the treaty that undermines these simple propositions.

Any attempt by Washington to read such a limitation into the treaty must fail. All of the canons or treaty construction obstruct such an inference, but one such canon is particularly

lethal to Washington's theory: the "reservation of rights" canon. It is well-settled that treaties are to construed as a grant from the Indians to the United States, not the reverse, and that any rights specified in the treaty are deemed "reserved" by the Indians. See, e.g. Winans, supra; U.S. v. Washington, 520 F.2d 676, 684 (9th Cir. 1975). Prior to the signing of the Stevens Treaty, the Indians had the absolute right to harvest any species they desired. They had the right to harvest shrimp and scallops; whether or not they exercised that right is irrelevant. The right to fish reserved in the treaty therefore encompasses a right to harvest the named species.

This finding is consistent with the prior findings of this Court. In U.S. v. Washington, 384 F.Supp 312, 401 (W.D. Wash. 1974), Judge Boldt established as a conclusion of law that:

> [t]he right secured by the treaties to the Plaintiff tribes is not limited as to species of fish, the origin of fish, the purpose or use, or the time or manner of taking, except to the extent necessary to achieve preservation of the resource and to allow non-Indians an opportunity to fish in common with treaty right fishermen outside reservation boundaries.

Thus the law of the case as well as the principles of treaty interpretation repudiates the first theory advanced by Washington.

Washington Theory Number Two: Deep-Water Harvest

The second limit on the Tribes' treaty rights sought by Washington relies on the "usual and accustomed grounds and stations" clause in the Stevens Treaty. Washington argues that deep-water areas are excluded as a matter of law from all Tribes' usual and accustomed grounds, because none of the tribes engaged in deep-water harvest at or before treaty time.

Determination of each tribe's usual and accustomed grounds requires a factual inquiry by the Court; each tribe must come forward and prove its usual and accustomed grounds and stations at the time the treaty was signed. However, Washington wishes to pre-empt some portion of this factual determination, and have the Court exclude all deep-water areas from treaty coverage. The Court declines to make such a finding.

As discussed above, prior to the signing of the Stevens Treaty, the Tribes had the absolute right to fish for whatever species they desired within their usual and accustomed grounds. Similarly, they had the absolute right to plumb any depths within those usual and accustomed grounds. Just as it is irrelevant that the Tribes chose not to harvest the named species, it is irrelevant that they could not, because of technological limitations, harvest shellfish in deep-water areas. Had it been availed of the technology, any tribe could have harvested shellfish in the deep waters of their usual and accustomed

grounds, areas where they had previously fished only for anadromous fish.

Consistent with these observations, the Court concludes as a matter of law that usual and accustomed grounds and stations do not vary with the species of fish, and that the usual and accustomed grounds and stations for non-anadromous fish are coextensive with those of anadromous fish. And, as there is ample evidence that at least some of the tribes' usual and accustomed grounds and stations for anadromous fish include deep-water areas, See e.g., United States v. Washington, 384 F.Supp. at 367, 369, 371, 374, the Court will not exclude deep-water areas from any determination of usual and accustomed grounds and stations in this case.

IT IS SO ORDERED.

The Clerk of the Court is directed to send copies of this Order to all counsel of record and others entitled to notice, via United States Mail, immediately.

DATED this 5 day of January, 1994.

EDWARD RAFEEDIE
United States District Judge

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	No. CV 9213 Subproceeding No. 89-3 ORDER CLARIFYING PRIOR ORDER DENYING SUMMARY JUDGMENT RE: CERTAIN SPECIES AND DEEP-WATER HARVEST

TO ALL COUNSEL OF RECORD:

On January 6, 1994, the Court issued an order denying summary judgment to defendants regarding the issues of certain species and deep-water harvest. The parties have interpreted the Court's order as a grant of summary judgment in favor of plaintiffs. It was not the Court's intention to bestow this benefit upon the non-moving party. Notwithstanding any language in the order indicating otherwise, it was the Court's intention to reject the interpretation offered by defendants, not to adopt an alternative interpretation as a matter of law. The order was neither a grant of summary judgment, nor a partial adjudication of issues; it was merely a denial of summary judgment. Any language indicating otherwise should be disregarded. The issues raised in the summary judgment motion remain to be resolved at

trial. The plaintiff tribes, all of them, must still come forward with evidence proving usual and accustomed grounds.

IT IS SO ORDERED.

The Clerk of the Court is directed to send copies of this Order to all counsel of record and others entitled to notice, via United States mail, immediately.

DATED this ___ day of January, 1994.

EDWARD RAFEEDIE
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	No. CV 9213 ORDER ON REQUESTS FOR DETERMINATION RE HERRING FISHERIES

This matter having come on before the Court on the Request for Determination re Non-Anadromous Fish by defendants Fisheries and Game, and upon the Requests for Determination of Right to Engage in Herring Fisheries filed by the following tribes: Lummi, Swinomish, Suquamish, Port Gamble Band, Squaxin Island, Skokomish, Nisqually, Puyallup and Upper Skagit; and the Court having read and thoroughly considered the memoranda of all parties with respect to these requests and the following reports prepared by Dr. Barbara Lane (in addition to her reports admitted into evidence at trial); "The Indian Herring Fishery From Earliest Times to the Mid-Nineteenth Century"; "Non-Indian Involvement in Herring Fisheries in Western Washington, 1855-1880"; "Supplemental Report on Indian Herring and Herring Roe Fisheries"; and

"Identity, Treaty Status and Fisheries of the Suquamish Tribe of the Port Madison Reservation"; the Court hereby makes the following determinations:

1. The subject matter of the original trial in this action was limited to off-reservation treaty Indian fishing rights in the case area and the application of said rights to anadromous fish resources. (See FPTO §5 and C.ofL. #7).

2. The Court has, however, expressly retained continuing jurisdiction to assure implementation of the Court's rulings and to deal with environmental issues and other relevant matters. (See 384 F.Supp. at 347, and C.ofL. #48). The fact that Final Decision #I and related orders are on appeal does not divest this Court of jurisdiction to deal with matters not a part of the judgment appealed no related directly to those previous rulings. (See Bullock v. Director of Patuxent Institution, 190 A.2d 789 (Md. 1963). For example, issues relating to fishing outside of the case area, on-reservation fishing, or non-anadromous fishing are clearly within the subject matter jurisdiction of this Federal District Court, (see F.ofF. #11 and C.ofL. #21) so that litigation with respect to such issues could clearly be brought before this Court in separate actions; however, equity favors prevention of a multiplicity of actions, Camp v. Boyd, 229 U.S. 530 (1913), and in the opinion of this Court, proper exercise of its jurisdiction permits, and efficient administration of justice requires, this Court to deal with matters

related to, but not included within, Final Decision #I such as possible treaty right non-anadromous fishing.

3. On the present record it is not necessary, nor have the parties requested, that the Court make broad or final determinations with respect to non-anadromous fishing. The sole issue before the Court at this time is the possible treaty entitlement of certain tribal applicants to participate in fisheries for non-anadromous herring and/or herring roe. Pursuant to paragraph G. 1. of the Order for Program to Implement Interim Plan, the nine tribes listed above have requested that the Court make a preliminary determination as to their entitlement to participate in such herring fisheries, and have submitted evidence consisting primarily of the anthropological reports of Dr. Barbara Lane to support their claims of such treaty entitlement. Based upon the evidence submitted, the Court finds that prima facie showings of treaty entitlement have been made by the following tribes: Lummi, Swinomish, Suquamish, Skokomish, Port Gamble, Puyallup and Nisqually, and that therefore such tribes shall be entitled to conduct off-reservation herring fisheries subject to the provision s set forth in paragraph 5 below, which herring fisheries may be conducted at each tribe's usual and accustomed fishing places as set forth in the Findings of Fact for each respective tribe; except that with respect to the Swinomish Indian Tribal Community and the Suquamish Tribe, for which no usual and accustomed places

have been found by the Court, those tribes shall be entitled to conduct herring fisheries at their claimed usual and accustomed fishing places, subject to the state's authority to contest any such location consistent with the prior judgment and orders of this Court, and subject to resolution of the dispute between the Lummi and Swinomish Tribes concerning fishing locations.

4. The Court finds that the Squaxin Island Tribe and Upper Skagit Tribe have not established a prima facie showing of treaty entitlement to participate in non-anadromous herring fishery, but that further opportunity to present evidence as to such entitlement shall be provided to these two tribes and any other applicant at the hearing to be held pursuant to paragraph 6 below.

5. Those tribes authorized to conduct non-anadromous herring fisheries shall filed with the Court and serve upon defendant Department of Fisheries, not later than April 2, 1975, tribal regulations concerning such fisheries, which shall include, inter alia, the following information: Whether fisheries will be conducted for herring, or herring roe, or both; proposed opening date, specific hours and days of the week of the fishery, and the locations at which said fishery will be conducted, whether for herring or herring roe. All tribes authorized to conduct herring fisheries and the defendant Department of Fisheries are directed to contact Dr. Whitney for the purpose of arranging one or more meetings prior to April 9, 1975 to confer and attempt to resolve

differences concerning the following matters: Opening dates for tribal herring fisheries; possible uniform closed periods for treaty and non-treaty herring fisheries; "Principles of Management for Herring" and other appropriate procedures to insure necessary spawning escapement and conservation of the herring stocks; possible questions as to usual and accustomed fishing locations; possible questions concerning sufficiency of tribal regulations; and other relevant matters.

6. A hearing will be held with respect to treaty herring fisheries on Wednesday, April 9, 1975 at 9:30 a.m. to receive further anthropological or biological testimony as may be necessary to deal with the matters referred to above and to hear oral argument from counsel with respect to herring fishery issues remaining unresolved at that time.

IT IS SO ORDERED this 28th day of March, 1975.

GEORGE H. BOLDT
Sr. United States District Judge

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10 Stat. 1132

TREATY WITH NISQUALLYS, &c. Dec 26, 1854

FRANKLIN PIERCE

PRESIDENT OF THE UNITED STATES OF AMERICA

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:--

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indians affairs of the said Territory, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Stehchass, T'Peek-sin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United Sates, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish, or White Rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence

northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, vis: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's Inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

ARTICLE IV. In consideration of the above session, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years, two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year; and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE V. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE VIII. The aforesaid tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the Untied States, but to deliver them up to the authorities for trial.

ARTICLE IX. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, [L.S.]
Governor and Superintendent Territory of Washington.

QUI-EE-METL,	his x mark.[L.S.]
SNO-HO-DUMSET,	his x mark.[L.S.]
LESH-HIGH,	his x mark.[L.S.]
SLIP-O-LEM,	his x mark.[L.S.]
KWI-ATS,	his x mark.[L.S.]
STEE-HIGH,	his x mark.[L.S.]
DI-A-KEH,	his x mark.[L.S.]
HI-TEN,	his x mark.[L.S.]
SQUA-TA-HUN,	his x mark.[L.S.]
KAHK-TSE-MIN,	his x mark.[L.S.]
SONAN-O-YUTL,	his x mark.[L.S.]
KL-TEHP,	his x mark.[L.S.]
SAHL-KO-MIN,	his x mark.[L.S.]
T'BET-STE-HEH-BIT,	his x mark.[L.S.]
TCHA-HOOS-TAN,	his x mark.[L.S.]
KE-CHA-HAT,	his x mark.[L.S.]
SPEE-PEH,	his x mark.[L.S.]
SWE-YAH-TUM,	his x mark.[L.S.]
CHA-ACHSH,	his x mark.[L.S.]
PICH-KEHD,	his x mark.[L.S.]
S'KLAH-O-SUM,	his x mark.[L.S.]

SAH-LE-TATL,	his x mark.[L.S.]
SEE-LUP,	his x mark.[L.S.]
E-LA-KAH-KA,	his x mark.[L.S.]
SLUG-YEH,	his x mark.[L.S.]
HI-NUK,	his x mark.[L.S.]
MA-MO-NISH,	his x mark.[L.S.]
CHEELS,	his x mark.[L.S.]
KNUTCANU,	his x mark.[L.S.]
BATS-TA-KOBE,	his x mark.[L.S.]
WIN-NE-YA,	his x mark.[L.S.]
KLO-OUT,	his x mark.[L.S.]
SE-UCH-KA-NAM,	his x mark.[L.S.]
SKE-MAH-HAN,	his x mark.[L.S.]
WUTS-UN-A-PUM,	his x mark.[L.S.]
QUUTS-A-TADM,	his x mark.[L.S.]
QUUT-A-HEH-MTSN,	his x mark.[L.S.]
YAH-LEH-CHN,	his x mark.[L.S.]
TO-LAHL-KUT,	his x mark.[L.S.]
YUL-LOUT,	his x mark.[L.S.]
SEE-AHTS-OOT-SOOT,	his x mark.[L.S.]
YE-TAKHO,	his x mark.[L.S.]
WE-PO-IT-EE,	his x mark.[L.S.]
KAH-SLD,	his x mark.[L.S.]
LA'H-HOM-KAN,	his x mark.[L.S.]
PAH-HOW-AT-ISH,	his x mark.[L.S.]
SWE-YEHM,	his x mark.[L.S.]
SAH-HWILL,	his x mark.[L.S.]
SE-KWAHT,	his x mark.[L.S.]
KAH-HUM-KLT,	his x mark.[L.S.]
YAH-KWO-BAH,	his x mark.[L.S.]
WUT-SAH-LE-WUN,	his x mark.[L.S.]
SAH-BA-HAT,	his x mark.[L.S.]
TEL-E-KISH,	his x mark.[L.S.]
SWE-KEH-NAM,	his x mark.[L.S.]
SIT-OO-OAH,	his x mark.[L.S.]
KO-QUEL-A-CUT,	his x mark.[L.S.]
JACK,	his x mark.[L.S.]
KEH-KISE-BEL-LO,	his x mark.[L.S.]
GO-YEH-HN,	his x mark.[L.S.]
SAH-PUTSH,	his x mark.[L.S.]
WILLIAM,	his x mark.[L.S.]

Executed in the presence of us:--

M. T. SIMMONS, *Indian agent.*
JAMES DOTY, *Secretary of the Commission.*
C. H. MASON, *Secretary Washington Territory.*
W. A. SLAUGHTER, *1st Lieut. 4th Infantry.*
JAMES McALISTER,
E. GIDDINGS, jr.,
GEORGE SHAZER,
HENRY D. COCK,
S. S. FORD, jr.,
JOHN W. McALISTER
CLOVINGTON CUSHMAN,
PETER ANDERSON,
SAMUEL KLADY,
W. H. PULLEN,
P. O. HOUGH,
E. R. TYERALL,
GEORGE GIBBS,
BENJ. F. SHAW, *Interpreter*,
HAZARD STEVENS.

And whereas the said treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the third day of March, one thousand eight hundred and fifty-five, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:—

"IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,

"March 3, 1855.

"*Resolved*, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates or the Nisqually, Puyallup, Steilacoom, Squawksin, S'Hom-amish, Steth-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of

Indians occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

"Attest: ASBURY DICKINS,
"*Secretary.*"

Now, therefore, be it known that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the third of March, one thousand eight hundred and fifty-five, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this tenth day of April, in the year of our Lord one thousand eight hundred and fifty-five, and of the independence of the United States the seventy-ninth.

FRANKLIN PIERCE.

By the President:
W. L. MARCY, *Secretary of State.*

12 Stat. 927

TREATY WITH THE DWAMISH & c.* INDIANS.
Jan. 22, 1855

Treaty between the United States and the Dwámish, Suquámish, and other allied and subordinate Tribes of Indians in Washington Territory. Concluded at Point Elliott, Washington Territory, January 22, 1855. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 11, 1859.

JAMES BUCHANAN

PRESIDENT OF THE UNITED STATES

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a Treaty was made and concluded at Múckl-te-óh, or Point Elliott, in the Territory of Washington, the twenty-second day of January, one thousand eight hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the Dwámish, Suquámish, Sk-táhl-mish, Sam-áhmish, Smalh- kamish, Skope-áhmish, St-káh-mish, Snoquálmoo, Skai-wha-mish, N'Quentl-má-mish, Sk-táh-le-jum, Stoluck-whá-mish, Sno-ho-mish, Skágit, Kik-i-állus, Swin-á-mish, Squin-áh-mish, Sah-ku-méhu, Noo-whá-há, Nook-wa-cháh-mish, Mee-see-qua-guilch, Cho-bah- áh-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes and duly authorized by them; which treaty is in the words and figures following to wit:

Articles of agreement and convention made and concluded at Múckl-te-óh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen and delegates of the Dwámish, Suquámish, Sk-táhl-mish,

Sam-áhmish, Smalh-kamish, Skope-áhmish, St-káh- mish, Snoquálmoo, Skai-wha-mish, N'Quentl-má-mish, Sk-táh-le-jum, Stoluck-whá-mish, Sno-ho-mish, Skágit, Kik-i-állus, Swin-á- mish, Squin-áh-mish, Sah-ku-méhu, Noo-whá-há, Nook-wa-cháh- mish, Mee-sée-qua-guilch, Cho-bah-áh-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet, and thence round the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes an bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island, called Sháis-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of

separation of the mouths emptying respectively into Bellingham Bay and the Gulf of George. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

ARTICLE III. There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish River, including Tulalip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory. *Provided, however*, That the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

ARTICLE IV. The said tribes and bands agree to remove to and settle upon the said first above-mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however*, that they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE VI. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner—that is to say: For the first year after the ratification

hereof, fifteen thousand dollars; for the next two years, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each years; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same; and the Superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE VII. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE VIII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on

any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE X. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

ARTICLE XII. The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE XIII. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE XIV. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to

employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, *Governor and Superintendent.* [L.S.]
SEATTLE, *Chief of the Dwamish and Suquamish tribes.*
his x mark. [L.S.]
PAT-KA-NAM, *Chief of the Snoqualmoo, Snohomish and other tribes.* his x mark. [L.S.]
CHOW-ITS-HOOT, *Chief of the Lummi and other tribes.*
his x mark. [L.S.]
GOLIAH, *Chief of the Skagits and other allied tribes.*
his x mark. [L.S.]
KWALLATTUM, or General Pierce, *Sub-chief of the Skagit tribe.* his x mark. [L.S.]
S'HOOTST-HOOT, *Sub-chief of Snohomish.* his x mark. [L.S.]
SNAH-TALC, or Bonaparte, *Sub-chief of Snohomish.*
his x mark. [L.S.]
SQUUSH-UM, or The Smoke, *Sub-chief of the Snoqualmoo.*
his x mark. [L.S.]
SEE-ALLA-PA-HAN, or The Priest, *Sub-chief of Sk-tah-le-jum.*
his x mark. [L.S.]
HE-UCH-KA-NAM, or George Bonaparte, *Sub-chief of Snohomish.* his x mark. [L.S.]
TSE-NAH-TALC, or Joseph Bonaparte, *Sub-chief of Snohomish.*
his x mark. [L.S.]
NS'SKI-OOS, or Jackson, *Sub-chief of Snohomish.*
his x mark. [L.S.]
WATS-KA-LAH-TCHIE, or John Hobtst-hoot, *Sub-chief of Snohomish.* his x mark. [L.S.]

SMEH-MAI-HU, *Sub-chief of Skai-wha-mish.*
his x mark. [L.S.]

SLAT-EAH-KA-NAM, *Sub-chief of Snoqualmoo.*
his x mark. [L.S.]

ST'HAU-AI, *Sub-chief of Snoqualmoo.* his x mark. [L.S.]

LUGS-KEN, *Sub-chief of Skai-wha-mish.* his x mark. [L.S.]

S'HEHT-SOOLT, or Peter, *Sub-chief of Snohomish.*
his x mark. [L.S.]

DO-QUEH-OO-SATL, *Snoqualmoo tribe.* his x mark. [L.S.]

JOHN KANAM, *Snoqualmoo sub-chief.* his x mark. [L.S.]

KLEMSH-KA-NAM, *Snoqualmoo.* his x mark. [L.S.]

TS'HUAHNTL, *Dwa-mish sub-chief.* his x mark. [L.S.]

KWUSS-KA-NAM, or George Snatelum, Sen., *Skagit tribe.*
his x mark. [L.S.]

HEL-MITS, or George Snatelum, *Skagit sub-chief.*
his x mark. [L.S.]

S'KWAI-KWI, *Skagit tribe, sub-chief.* his x mark. [L.S.]

SEH-LEK-QU, *Sub-chief Lummi tribe.* his x mark. [L.S.]

S'H'-CHEH-OOS, or General Washington, *Sub-chief of Lummi tribe.* his x mark. [L.S.]

WHAI-LAN-HU, or Davy Crockett, *Sub-chief of Lummi tribe.*
his x mark. [L.S.]

SHE-AH-DELT-HU, *Sub-chief of Lummi tribe.*
his x mark. [L.S.]

KWULT-SEH, *Sub-chief of Lummi tribe.* his x mark. [L.S.]

KWULL-ET-HU, *Lummi tribe.* his x mark. [L.S.]

KLEH-KENT-SOOT, *Skagit tribe.* his x mark. [L.S.]

SOHN-HEH-OVS, *Skagit tribe.* his x mark. [L.S.]

S'DEH-AP-KAN, or General Warren, *Skagit tribe.*
his x mark. [L.S.]

CHUL-WHIL-TAN, *Sub-chief of Suquamish tribe.*
his x mark. [L.S.]

SKE-EH-TUM, *Skagit tribe.* his x mark. [L.S.]

PATCHKANAM, or Dome, *Skagit tribe.* his x mark. [L.S.]

SATS-KANAM, *Squin-ah-nush tribe.* his x mark. [L.S.]

SD-ZO-MAHTL, *Kik-ial-lus band.* his x mark. [L.S.]

DAHTL-DE-MIN, *Sub-chief of Sah-ku-meh-hu.*
his x mark. [L.S.]

SD'ZEK-DU-NUM, *Me-sek-wi-guilse sub-chief*
his x mark. [L.S.]

NOW-A-CHAIS, *Sub-chief of Dwamish.* his x mark. [L.S.]

MIS-LO-TCHE, or Wah-hehl-tchoo, *Sub-chief of Suquamish.*
his x mark. [L.S.]

SLOO-NOKSH-TAN, or Jim, *Suquamish tribe.*
his x mark. [L.S.]

MOO-WHAH-LAD-HU, or Jack, *Suquamish tribe.*
his x mark. [L.S.]

TOO-LEH-PLAN, *Suquamish tribe.* his x mark. [L.S.]

HA-SEH-DOO-AN, or Keo-kuck, *Dwamish tribe.*
his x mark. [L.S.]

HOOVILT-MEH-TUM, *Sub-chief of Suquamish.*
his x mark. [L.S.]

WE-AI-PAH, *Skaiwhamish tribe.* his x mark. [L.S.]

S'AH-AN-HU, or Hallam, *Snohomish tribe.* his x mark. [L.S.]

SHE-HOPE, or General Pierce, *Skagit tribe.* his x mark. [L.S.]

HWN-LAH-LAKQ, or Thomas Jefferson, *Lummi tribe.*
his x mark. [L.S.]

CHT-SIMPT, *Lummi tribe.* his x mark. [L.S.]

TSE-SUM-TEN, *Lummi tribe.* his x mark. [L.S.]

KLT-HAHL-TEN, *Lummi tribe.* his x mark. [L.S.]

KUT-TA-KANAM, or John, *Lummi tribe.* his x mark. [L.S.]

CH-LAH-BEN, *Noo-qua-cha-mish band.* his x mark. [L.S.]

NOO-HEH-OOS, *Snoqualmoo tribe.* his x mark. [L.S.]

HWEH-UK, *Snoqualmoo tribe.* his x mark. [L.S.]

PEH-NUS, *Skai-whamish tribe.* his x mark. [L.S.]

YIM-KA-NAM, *Snoqualmoo tribe.* his x mark. [L.S.]

TWOOI-AS-KUT, *Skaiwhamish tribe.* his x mark. [L.S.]

LUCH-AL-KANAM, *Snoqualmoo tribe.* his x mark. [L.S.]

S'HOOT-KANAM, *Snoqualmoo tribe.* his x mark. [L.S.]

SME-A-KANAM, *Snoqualmoo tribe.* his x mark. [L.S.]

SAD-ZIS-KEH, *Snoqualmoo.* his x mark. [L.S.]

HEH-MAHL, *Skaiwhamish band.* his x mark. [L.S.]

CHARLEY, *Skagit tribe.* his x mark. [L.S.]

SAMPSON, *Skagit tribe.* his x mark. [L.S.]

JOHN TAYLOR, *Snohomish tribe.* his x mark. [L.S.]

HATCH-KWENTUM, *Skagit tribe.* his x mark. [L.S.]

YO-I-KUM, *Skagit tribe.* his x mark. [L.S.]

T'KWA-MA-HAN, *Skagit tribe.* his x mark. [L.S.]

STO-DUM-KAN, *Swinamish band.* his x mark. [L.S.]

BE-LOLE, *Swinamish band.* his x mark. [L.S.]

D'ZO-LOLE-GWAM-HU, *Skagit tribe.* his x mark. [L.S.]

STEH-SHAIL, William, *Skaiwhamish band.*	his x mark.	[L.S.]
KEL-KAHL-TSOOT, *Swinamish tribe.*	his x mark.	[L.S.]
PAT-SEN, *Skagit tribe.*	his x mark.	[L.S.]
PAT-TEH-US, *Noo-wha-ah sub-chief.*	his x mark.	[L.S.]
S'HOOLK-KA-NAM, *Lummi sub-chief.*	his x mark.	[L.S.]
CH-LOK-SUTS, *Lummi sub-chief.*	his x mark.	[L.S.]

Executed in the presence of us:—

M. T. SIMMONS, *Indian agent.*
C. H. MASON, *Secretary of Washington Territory.*
BENJ. F. SHAW, *Interpreter.*
CHAS. M. HITCHCOCK.
H. A. GOLDSBOROUGH.
GEORGE GIBBS.
JOHN H. SCRANTON.
HENRY D. COCK.
S. S. FORD, Jr.
ORRINGTON CUSHMAN.
ELLIS BARNES.
R. S. BAILEY.
S. M. COLLINS.
LAFAYETEE BALCH.
E. S. FOWLER.
J. H. HALL.
ROB'T DAVIS.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the chiefs, headmen and delegates of the Dwámish, Suquámish and other allied and subordinate tribes of Indians occupying certain lands situated in Washington Territory, signed the 22d day of January, 1855.

"Attest: "ASBURY DICKINS, *Secretary.*"

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advise and consent of the Senate, as expressed in their resolution of the eighth of March, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this eleventh day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

JAMES BUCHANAN.

By the President:
LEWIS CASS, *Secretary of State.*

TREATY WITH THE S'KLALLAMS. January 26, 1855.

12 Stat. 933

Treaty between the United States of America and the S'Klallams Indians. Concluded at Point no Point, Washington Territory, January 26, 1855; Ratified by the Senate, March 8, 1859; Proclaimed by the President of the United States, April 18, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, a treaty was made and concluded at Hahd Skus, or Point no Point, in Washington Territory, on the twenty-sixth day of January, eighteen hundred and fifty-five, between Isaac I. Stevens, governor, and Superintendent of Indian Affairs for the said Territory, on the part of the United States, and the hereinafter named Chiefs, Headmen and Delegates of the different villages of the S'Klallams Indians, viz.: the Kah-tai, Squah-quaihtl, Tch-queen, Ste-tehtlum, Tsohkw, Yennis, El-hwa, Pishst, Hunnint, Klat-la-wash, and Oke-no, and also of the Sko-ko-mish, Too-an-hooch, and Chem-a-kum tribes occupying certain lands on the straits of Fuca and Hood's Canal, in the Territory of Washington, on behalf of said tribes, and duly authorized by them; which treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at Hahd-skus, or Point no Point, Suquamish Head, in the Territory of Washington, this twenty-sixth day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different villages of the S'Klallams, viz.: Kah-tai, Squah-quaihtl, Tch-queen, Ste-tehtlum, Tsohkw, Yennis, Elh-wa, Pishtst, Hunnint, Klat-la-wash, and Oke-ho, and also of the Sko-ko-mish, To-an-hooch, and Chem-a-kum tribes, occupying certain lands on the Straits of Fuca and Hood's Canal,

in the Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, viz.: Commencing at the mouth of the Okeho River, on the Straits of Fuca; thence southeastwardly along the westerly line of territory claimed by the Makah tribe of Indians to the summit of the Cascade Range; thence still southeastwardly and southerly along said summit to the head of the west branch of the Satsop River, down that branch to the main fork; thence eastwardly and following the line of lands heretofore ceded to the the United States by the Nisqually and other tribes and bands of Indians, to the summit of the Black Hills, and northeastwardly to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded to the United States by the Dwamish, Suquamish, and other tribes and bands of Indians, to Suquamish Head; thence northerly through Admiralty Inlet to the Straits of Fuca; thence westwardly through said straits to the place of beginning; including all the right, title, and interest of the said tribes and bands to any land in the Territory of Washington.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tract of land, viz.: the amount of six sections, or three thousand eight hundred and forty acres, situated at the head of Hood's Canal, to be hereafter set apart, and so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes and bands, and of the superintendent or agent; but, if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band, to occupy the same in common with those above mentioned, he shall be at liberty to do so.

ARTICLE III. The said tribes and bands agree to remove to and settle upon the said reservation within one year after the ratification of this treaty, or sooner if the means are funished them. In the mean time, it shall be lawful for them to reside upon any lands not in the actual claim or occupation of

citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE IV. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE V. In consideration of the above cession the United States agree to pay to the said tribes and bands the sum of sixty thousand dollars, in the following manner, that is to say: during the first year after the ratification hereof, six thousand dollars; for the next two years, five thousand dollars each year; for the next three years, four thousand dollars each year; for the next four years, three thousand dollars each year; for the next five years, two thousand four hundred dollars each year; and for the next five years, one thousand six hundred dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indians affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE VI. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of six thousand dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE VII. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted, remove them from said reservation to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal; or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other lands as may be selected in lieu thereof, to be surveyed into lots, and assign the

same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made therefor accordingly.

ARTICLE VIII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE IX. The said tribes and bands acknowledged their dependence on the Government of the United States, and promise to be friendly with all citizens thereof; and they pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe, except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the United States, but to deliver them up for trial by the authorities.

ARTICLE X. The above tribes and bands are desirous to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging thereto who shall be guilty of bringing liquor into said reservation or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE XI. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for the period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide a

smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XII. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE XIII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE XIV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, *Governor and Superintendent.* [L.S.]

CHITS-A-MAH-HAN, the Duke of York, *Chief of the S'klallams* his x mark. [L.S.]
DAH-WHIL-LUK, *Chief of the Sko-ko-mush.* his x mark. [L.S.]
KUL-KAH-HAN, or General Pierce, *Chief of the Chem-a-kum.* his x mark. [L.S.]
HOOL-HOLE-TAN, or Jim, *Sko-ko-mish sub-chief.* his x mark. [L.S.]
SAI-A-KADE, or Frank, *Sko-ko-mish sub-chief.* his x mark. [L.S.]
LOO-GWEH-OOS, or George, *Sko-ko-mish sub-chief.* his x mark. [L.S.]

E-DAGH-TAN, or Tom, *Sko-ko-mish sub-chief.*
his x mark. [L.S.]
KAI-A-HAN, or Daniel Webster, *Chem-a-kum sub-chief.*
his x mark. [L.S.]
ETS-SAH-QUAT, *Chem-a-kum sub-chief.* his x mark. [L.S.]
KLEH-A-KUNST, *Chem-a-kum sub-chief.* his x mark. [L.S.]
HE-ATL, Duke of Clarence, *S'klallam sub-chief.*
his x mark. [L.S.]
LACH-KA-NAM, or Lord Nelson, *S'klallam sub-chief.*
his x mark. [L.S.]
TCHOTEST, *S'klallam sub-chief.* his x mark. [L.S.]
HOOT-OTE ST, or General Lane, *S'klallam sub-chief.*
his x mark. [L.S.]
TO-TOTESH, *S'klallam sub-chief.* his x mark. [L.S.]
HA-KWIA-MIHL, *S'klallam sub-chief.* his x mark. [L.S.]
SKAI-SE-EE, or Mr. Newman, *S'klallam sub-chief.*
his x mark. [L.S.]
KAHS-SAHS-A-MATL, *S'klallam sub-chief.* his x mark. [L.S.]
S'HOTE-CH-STAN, *S'klallam sub-chief.* his x mark. [L.S.]
LAH-ST, or Tom, *S'klallam sub-chief.* his x mark. [L.S.]
TULS-MET-TUM, Lord Jim, *S'klallam sub-chief.*
his x mark. [L.S.]
YAHT-LE-MIN, or General Taylor, *S'klallam sub-chief.*
his x mark. [L.S.]
KLA-KOISHT, or Captain, *S'klallam sub-chief.*
his x mark. [L.S.]
SNA-TALC, or General Scott, *S'klallam sub-chief.*
his x mark. [L.S.]
TSEH-A-TAKE, or Tom Benton, *S'klallam sub-chief.*
his x mark. [L.S.]
YAH-KWI-E-NOOK, or General Gaines, *S'klallam sub-chief.*
his x mark. [L.S.]
KAI-AT-LAH, or General Lane, Jr., *S'klallam sub-chief.*
his x mark. [L.S.]
CAPTAIN JACK, *S'klallam sub-chief.* his x mark. [L.S.]
HE-ACH-KATE, *S'klallam sub-chief.* his x mark. [L.S.]
T'SOH-AS-HAU, or General Harrison, *S'klallam sub-chief.*
his x mark. [L.S.]
KWAH-NALT-SOTE, *S'klallam sub-chief.* his x mark. [L.S.]
S'HOKE-TAN, *S'klallam sub-chief.* his x mark. [L.S.]
PAITL, *S'klallam sub-chief.* his x mark. [L.S.]
WEN-A-HAP, *S'klallam sub-chief.* his x mark. [L.S.]

KLEW-SUM-AH, *S'klallam sub-chief.* his x mark. [L.S.]
SE-ATT-HOME-TAU, *S'klallam sub-chief.* his x mark. [L.S.]
TSAT-SAT-HOOT, *S'klallam tribe.* his x mark. [L.S.]
PE-AN-HO, *S'klallam tribe.* his x mark. [L.S.]
YA-AH-HUM, or John Adams, *S'klallam tribe.* his x mark. [L.S.]
TI-ITCH-STAN, *S'klallam tribe.* his x mark. [L.S.]
SOO-YAHNTCH, *S'klallam tribe.* his x mark. [L.S.]
TTSEH-A-TAKE, *S'klallam tribe.* his x mark. [L.S.]
HE-ATS-AT-SOOT, *S'klallam tribe.* his x mark. [L.S.]
TOW-OOTS-HOOT, *S'klallam tribe.* his x mark. [L.S.]
TSHEH-HAM, or General Pierce, *S'klallam tribe.* his x mark. [L.S.]
KWIN-NAS-SUM, or George, *S'klallam tribe.* his x mark. [L.S.]
HAI-AHTS, John, *S'klallam tribe.* his x mark. [L.S.]
HAI-OTEST, John, *S'klallam tribe.* his x mark. [L.S.]
SEH-WIN-NUM, *S'klallam tribe.* his x mark. [L.S.]
YAI-TST, or George, *S'klallam tribe.* his x mark. [L.S.]
HE-PAIT, or John, *S'klallam tribe.* his x mark. [L.S.]
SLIMM, or John, *S'klallam tribe.* his x mark. [L.S.]
T'KLALT-SOOT, or Jack, *S'klallam tribe.* his x mark. [L.S.]
S'TAI-TAN, or Sam, *S'klallam tribe.* his x mark. [L.S.]
HUT-TEST-OOT, *S'klallam tribe.* his x mark. [L.S.]
HOW-A-OWL, *S'klallam tribe.* his x mark. [L.S.]

Executed in the presence of us—

M. T. SIMMONS,
C. H. MASON, *Secretary Washington Territory*,
BENJ. F. SHAW, *Interpreter*,
JOHN H. SCRANTON,
JOSIAH P. KELLER,
C. M. HITCHCOCK, M.D.,
A. B. GOVE,
H. A. GOLDSBOROUGH,
B. J. MADISON,
F. A. ROWE,
JAS. M. HUNT,
GEORGE GIBBS, *Secretary*,
JOHN J. REILLY,
ROBT. DAVIS,
S. S. FORD, Jr.,

H. D. COCK,
ORRINGTON CUSHMAN,
J. CONKLIN.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the S'Klallams Indians occupying lands in the Straits of Fuca and Hood's Island, in Washington Territory, signed 26th January, 1855.

"Attest: "ASBURY DICKINS, *Secretary*."

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, eighteen hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this twenty-ninth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

JAMES BUCHANAN.

By the President:
LEWIS CASS, *Secretary of State.*

TREATY WITH THE MAKAH TRIBE. Jan. 31, 1855.

12 Stat. 939

Treaty between the United States of America and the Makah Tribe of Indians. Concluded at Neah Bay, Washington Territory, January 31, 1855; Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 18, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded at Neah Bay, in the Territory of Washington, on the thirty-first day of January, eighteen hundred and fifty-five, between Isaac I. Stevens, governor and superintendent of Indian affairs for said Territory, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the several villages of the Makah tribe of Indians, viz.: Neah Waatch, Tsoo-Yess, and Osett, occupying the country around Cape Classett or Flattery, on behalf of the said tribe and duly authorized by the same; which treaty is in the words and figures following, to wit:

Articles of agreement and convention, made and concluded at Neah Bay, in the Territory of Washington, this thirty-first day of January, in the year eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the several villages of the Makah tribe of Indians, viz: Neah Waatch, Tsoo-Yess, and Osett, occupying the country around Cape Classett or Flattery, on behalf of the said tribe and duly authorized by the same.

ARTICLE I. The said tribe hereby cedes, relinquishes, and conveys to the United States all their right, title, and interest in and to the lands and country occupied by it, bounded and described as follows, viz: Commencing at the mouth of the

Oke-ho River, on the Straits of Fuca; thence running westwardly with said straits to Cape Classett or Flattery; thence southwardly along the coast to Osett, or the lower Cape Flattery; thence eastwardly along the line of lands occupied by the Kew-déh-tut or Kwill-eh-yute tribe of Indians, to the summit of the coast range of mountains, and thence northwardly along the line of lands lately ceded to the United States by the S'Klallam tribe to the place of beginning, including all the island lying off the same on the straits and coast.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribe the following tract of land, viz: Commencing on the beach at the mouth of a small brook running into Neah Bay next to the site of the old Spanish fort; thence along the shore round Cape Classett or Flattery, to the mouth of another small stream running into the bay on the south side of said cape, a little above the Waatch village; thence following said brook to its source; thence in a straight line to the source of the first-mentioned brook, and thence following the same down to the place of beginning; which said tract shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or agent; but if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States here-after see fit to place upon the said reservation any other friendly tribe or band to occupy the same in common with those above mentioned, he shall be at liberty to do so.

ARTICLE III. The said tribe agrees to remove to and settle upon the said reservation, if required so to do, within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE IV. The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands:

Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE V. In consideration of the above cession the United States agree to pay to the said tribe the sum of thirty thousand dollars, in the following manner, that is to say: During the first year after the ratification hereof, three thousand dollars; for the next two years, twenty-five hundred dollars each year; for the next three years, two thousand dollars each year; for the next four years, one thousand five hundred dollars each year; and for the next ten years, one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of wishes of said Indians in respect thereto.

ARTICLE VI. To enable the said Indians to remove to and settle upon their aforesaid reservation, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve. And any substantial improvements heretofore made by any individual Indian, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made therefor accordingly.

ARTICLE VII. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted thereby, remove them from said reservation to such suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands; and he may further, at his discretion, cause the whole, or any portion of the lands hereby reserved, or such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be practicable.

ARTICLE VIII. The annuities of the aforesaid tribe shall not be taken to pay the debts of individuals.

ARTICLE IX. The said Indians acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in case of depredations against citizens. And the said tribe agrees not to shelter or conceal offenders against the United States, but to deliver up the same for trial by the authorities.

ARTICLE X. The above tribe is desirous to exclude from its reservation the use of ardent spirits, and to prevent its people from drinking the same, and therefore it is provided that any Indian belonging thereto who shall be guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE XI. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for the period of twenty years, an agricultural and industrial school, to be free to children of the said tribe in common with those of the other tribes of said district and to provide a smithy and carpenter's shop, and furnish them with the necessary tools and employ a blacksmith, carpenter and farmer for the like term to instruct the Indians in their respective occupations. *Provided, however,* That should it be deemed expedient a separate school may be established for the benefit of said tribe and such others as may be associated with it, and the like persons employed for the same purposes at some other suitable place. And the United States further agree to employ a physician to reside at the said central agency, or at such other school should one be

established, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States and not deducted from the annuities.

ARTICLE XII. The said tribe agrees to free all slaves now held by its people and not to purchase or acquire others hereafter.

ARTICLE XIII. The said tribe finally agrees not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in its reservation without consent of the superintendent or agent.

ARTICLE XIV. This treaty shall be obligatory on the contracting parties a soon as the same shall be ratified by the President of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned, chiefs, headmen and delegates of the tribe aforesaid have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, *Governor and Superintendent.* [L.S.]
TSE-KAUWTL, *Head Chief of the Makah Tribe.*
his x mark. [L.S.]
KAL-CHOTE, *Sub-chief of the Makahs.* his x mark. [L.S.]
TAH-A-HOWTL, *Sub-chief of the Makahs.* his x mark. [L.S.]
KAH-BACH-SAT, *Sub-chief of the Makahs.* his x mark. [L.S.]
KETS-KUS-SUM, *Sub-chief of the Makahs.* his x mark. [L.S.]
HAATSE, *Sub-chief of the Makahs.* his x mark. [L.S.]
KEH-CHOOK, *Sub-chief of the Makahs.* his x mark. [L.S.]
IT-AN-DA-HA, *Sub-chief of the Makahs.* his x mark. [L.S.]
KAH-PE-AN-HIE, or Andrew Jackson, *Sub-chief of the Makahs.*
his x mark. [L.S.]
TSAL-AB-OOS, or Peter, *Neah Village.* his x mark. [L.S.]
TAHOLA, *Neah Village.* his x mark. [L.S.]
KLEHT-LI-QUAT-STL, *Waatch Village.* his x mark. [L.S.]
TOO-WHAII-TAN, *Waatch Village.* his x mark. [L.S.]
TAHTS-KIN, *Neah Village.* his x mark. [L.S.]

NENCHOOP, *Neah Village.*	his x mark.	[L.S.]
AH-DE-AK-TOO-AH, *Osett Village.*	his x mark.	[L.S.]
WILLIAM, *Neah Village.*	his x mark.	[L.S.]
WAK-KEP-TUP, *Waatch Village.*	his x mark.	[L.S.]
KLAHT-TE-DI-YUKE, *Waatch Village.*	his x mark.	[L.S.]
OOBICK, *Waatch Village.*	his x mark.	[L.S.]
BICH-TOOK, *Waatch Village.*	his x mark.	[L.S.]
BAHT-SE-DITL, *Neah Village.*	his x mark.	[L.S.]
WACK-SHIE, *Neah Village.*	his x mark.	[L.S.]
HAH-YO-HWA, *Waatch Village.*	his x mark.	[L.S.]
DAHT-LEEK, or Mines, *Osett Village.*	his x mark.	[L.S.]
PAH-HAT, *Neah Village.*	his x mark.	[L.S.]
PAI-YEH, *Osett Village.*	his x mark.	[L.S.]
TSAH-WEH-SUP, *Neah Village.*	his x mark.	[L.S.]
AL-IS-KAH, *Osett Village.*	his x mark.	[L.S.]
KWE-TOW'TL, *Neah Village.*	his x mark.	[L.S.]
TCHOO-QUUT-LAH, or Yes Sir, *Neah Village.*	his x mark.	[L.S.]
KLATTS-OW-SEHP, *Neah Village.*	his x mark.	[L.S.]
KAI-KL-CHIS-SUM, *Neah Village.*	his x mark.	[L.S.]
KAH-KWT-LIT-HA, *Waatch Village.*	his x mark.	[L.S.]
HE-DAH-TITL, *Neah Village.*	his x mark.	[L.S.]
SAH-DIT-LE-UAD, *Waatch Village.*	his x mark.	[L.S.]
KLAH-KU-PIHL, *Tsoo-yess Village.*	his x mark.	[L.S.]
BILLUK-WHTL, *Tsoo-yess Village.*	his x mark.	[L.S.]
KWAH-TOO-QHALH, *Tsoo-yess Village.*	his x mark.	[L.S.]
YOOCH-BOOTT, *Tsoo-yess Village.*	his x mark.	[L.S.]
SWELL, or Jeff. Davis, *Neah Village.*	his x mark.	[L.S.]

Executed in the presence of us. The words "five hundred" being first interlined in the 5th article, and erasures made in the 8th and 9th articles.

M. T. SIMMONS, *Indian Agent.*
GEORGE GIBBS, *Secretary.*
B. F. SHAW, *Interpreter,*
C. M. HITCHCOCK, M.D.,
E. S. FOWLER.
ORRINGTON CUSHMAN,
ROBT. DAVIS.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:—

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the chiefs, headmen, and delegates of the Makah tribes of Indians occupying the country around Cape Classett or Flattery, in Washington Territory, signed 31st January, 1855.

"Attest: "ASBURY DICKINS, *Secretary.*"

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of March eighth, eighteen hundred and fifty-nine, hereby accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this eighteenth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

JAMES BUCHANAN.

By the President:
LEWIS CASS, *Secretary of State.*

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TREATY WITH THE QUI-NAI-ELTS, &c. July 1, 1855. Jan. 25, 1856.

12 Stat. 971

Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians. Concluded on the Qui-nai-elt River, in the Territory of Washington, July 1, 1855, and at the city of Olympia, January 25, 1856. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 11, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded on the Qui-nai-elt River, in the Territory of Washington, on the first day of July, one thousand eight hundred and fifty-five, and at the city of Olympia also in said Territory, on the twenty-fifth day of January, one thousand eight hundred and fifty-six, between Isaac I. Stevens, governor and superintendent of Indian affairs in the Territory aforesaid, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them; which treaty is in the words and figures following, to wit:—

Articles of agreement and convention made and concluded by and between Isaac I. Stevens, governor and superintendent of Indian affairs, of the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them.

ARTICLE I. The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them,

bounded and described as follows: Commencing at a point on the Pacific coast, which is the southwest corner of the lands lately ceded by the Makah tribe of Indians to the United States, and running easterly with and along the southern boundary of the said Makah tribe to the middle of the coast range of mountains; thence southerly with said range of mountains to their intersection with the dividing ridge between the Chehalis and Quiniatl Rivers; thence westerly with said ridge to the Pacific coast; thence northerly along said coast to the place of beginning.

ARTICLE II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner of claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby.

ARTICLE III. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and keep up and confine the stallions themselves.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of twenty-five thousand dollars, in the following manner, that is to say: For the first year after the ratification hereof, two thousand five hundred dollars; for the next two years, two thousand dollars each year; for the next three years, one

thousand six hundred dollars each year; for the next four years, one thousand three hundred dollars each year; for the next five years, one thousand dollars each year; and for the next five years, seven hundred dollars each year. All of which sums of money shall be applied to the use and benefit of the said Indians under the directions of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE V. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of the said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made accordingly therefor.

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE VIII. The said tribes and bands acknowledge their dependence on the government of the United States, and

promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens; and should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby; and if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as is prescribed in this article in cases of depredations against citizens. And the said tribes and bands agree not to shelter or conceal offenders against the laws of the United States, but to deliver them to the authorities for trial.

ARTICLE IX. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribes who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her, for such time as the President may determine.

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to the children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and to employ a blacksmith, carpenter, and farmer for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance to be defrayed by the United States, and not deducted from their annuities.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside on their reservations without consent of the superintendent or agent.

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at Olympia, January 25, 1856, and on the Qui-nai-elt River, July 1, 1855.

ISAAC I. STEVENS, *Governor and Sup't of Indian Affairs*. [L.S.]

TAH-HO-LAH, *Head Chief of Qui-nite-'l tribe*, his x mark. [L.S.]

HOW-YAT'L, *Head Chief of Quil-ley-yute tribe*, his x mark. [L.S.]

KAL-LAPE, *Sub-chief of Quil-ley-yutes*, his x mark. [L.S.]

TAH-AH-HA-WHT'L, *Sub-chief of Quil-ley-yutes*, his x mark. [L.S.]

LAY-LE-WHASH-ER, his x mark. [L.S.]
E-MAH-LAH-CUP, his x mark. [L.S.]
ASH-CHAK-A-WICK, his x mark. [L.S.]
AY-A-QUAN, his x mark. [L.S.]
YATS-SEE-O-KOP, his x mark. [L.S.]
KARTS-SO-PE-AH, his x mark. [L.S.]
QUAT-A-DE-TOT'L, his x mark. [L.S.]
NOW-AH-ISM, his x mark. [L.S.]
CLA-KISH-KA, his x mark. [L.S.]
KLER-WAY-SR-HUN, his x mark. [L.S.]
QUAR-TER-HEIT'L, his x mark. [L.S.]
HAY-NEE-SI-OOS, his x mark. [L.S.]
HOO-E-YAS'LSEE, his x mark. [L.S.]
QUILT-LE-SE-MAH, his x mark. [L.S.]
QUA-LATS-KAIM, his x mark. [L.S.]
YAH-LE-HUM, his x mark. [L.S.]
JE-TAH-LET-SHIN, his x mark. [L.S.]
MA-TA-A-HA, his x mark. [L.S.]

WAH-KEE-NAH, *Sub-chief of Qui-nite-'l tribe*, his x mark. [L.S.]

YER-AY-LET'L, *Sub-chief*,	his x mark.	[L.S.]
SILLEY-MARK'L,	his x mark.	[L.S.]
CHER-LARK-TIN,	his x mark.	[L.S.]
HOW-YAT-'L,	his x mark.	[L.S.]
KNE-SHE-GUARTSH, *Sub-chief*,	his x mark.	[L.S.]
KLAY-SUMETZ,	his x mark.	[L.S.]
KAPE,	his x mark.	[L.S.]
HAY-ET-LITE-'L, or John,	his x mark.	[L.S.]

Executed in the presence of us; the words "or tracts," in the II. article, and "next," in the IV. article, being interlined prior to execution.

M. T. SIMMONS, *Special Indian Agent.*
H. A. GOLDSBOROUGH, *Commissary, &c.*
B. F. SHAW, *Interpreter.*
JAMES MILTON, *Surveyor-General Washington Territory.*
F. KENNEDY.
J. Y. MILLER.
H. D. COCK.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of the same by a resolution in the words and figures following, to wit:—

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians in Washington Territory, signed 1st day of July, 1855, and 25th day of January, 1856.

"Attest: "ASBURY DICKINS, *Secretary.*"

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of March the eighth, one thousand eight

hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this eleventh day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Independence of the United States the eighty-third.

JAMES BUCHANAN.

By the President:
LEWIS CASS, *Secretary of State.*

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TRANSCRIPTION

Land
14262-1905

March 20, 1905

Henry F. Liston, Esq.
Superintendent in charge, Puyallup Agency,
Tacoma, Washington

Sir:

In your letter of February 14, 1905, you state that the S'Klallam Indians living near the village of Jamestown, Washington, under your charge, have made complaint to you with request that you lay the matter before this Office for an opinion in the premises. The Indians allege that they have been for generations taking clams from the tide lands of Sequim Bay, near Dungeness, without interference from anybody; that now three white men, George Davis, James Dick and Frank Fisher have leased these tide lands from the State of Washington, as claimed for a term of five years and have notified the Indians to cease digging clams, under penalty of prosecution. You state that the Indians use the clams not only for food, but also sell them to canning factories between the months of April and September; that they use them more especially as bate [sic] for crab fishing, which last occupation is practically the means by which they live; that they think that under the treaty with Governor Isaac I. Stevens, it was intended that they should not be prevented from digging these clams when and where the [sic] desire.

You further state that there is no reservation at the place named; that the only land the Indians have there is a small tract which they have purchased; that this is insufficient for them to make a living upon; that there is no question but that it will work a great hardship upon these Indians if they are prevented from

digging clams on their accustomed grounds. You have referred them to the treaty of January 26, 1855, with the said Indians, (12 Stats. 933), article 4 of which is as follows:

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all persons of the United States; and of erecting temporary houses of the purpose of curing; together with the privilege of hunting and gathering roots, and berries on open and unclaimed lands.
>
> Provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens.

You remark that the clam beds in question have never been cultivated; that the Indians wish to know whether they may be permitted to continue digging the clams from the tide lands of Sequim Bay, or whether it will be necessary for them to lease the lands in question from the State of Washington.

In reply you are advised that as the tide lands to which you refer are not embraced within the boundaries of an Indian reservation, it is the opinion of this office that such lands are under the control and jurisdiction of the State; that the Indians should not be permitted to trespass upon the tide lands leased from the State; that in case they desire special privileges as to the digging of clams from the tidelands [sic] referred to, it will be necessary for them to lease the same from the State of Washington.

However, if there are tide lands used in common by the citizens in that region, the Indians, under said article 4, have the right to take fish, clams, etc. from such lands. It does not appear from the statements contained in your letter that the citizens to whom you refer are interfering with the village used and occupied by the Indians and which appears to have been purchased by them.

You will advise the Indians mentioned of the views of this office respecting the matter involved.

Very respectfully,

[signature illegible]

Acting Commissioner

File reference:
Record Group 75, Records of the Bureau of Indian Affairs
Letters Sent, 1870-1908
Land Division, March 20, 1905
Volume 372, pages 440-442